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# CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF LOUISIANA,

AT

## NEW ORLEANS.

JANUARY, 1867.

### JUDGES OF THE COURT.

HON. WM. B. HYMAN, *Chief Justice.*

HON. ZENON LABAUVE,

HON. J. H. ILSLEY,

HON. R. K. HOWELL,

HON. J. G. TALIAFERRO,

*Associate Justices.*

No. 773.—BANK OF LOUISIANA, in Liquidation, *v.* EDWARD H. WILSON.

As insolvent, after his surrender, cannot maintain an action against a faithless agent or mandatory. Such action, and the right to maintain revocatory actions, pass to the syndic, and can be maintained by him alone for the benefit of the creditors.

By the decree of forfeiture, the corporation loses the faculty of suing in its corporate name.

**A**PPEAL from the Fourth District Court of New Orleans, *Théard, J.* Miles Taylor and J. B. Eustis, for plaintiff and appellant. A. G. Semmes and H. M. Spofford, for defendant and appellee.

TALIAFERRO, J. The defendant in this case, having a large claim against the Bank of Louisiana, levied, on the 10th of July, 1865, an attachment upon eight hundred and nine bales of the plaintiff's cotton, at Montgomery, in the State of Alabama. The bank, represented by liquidators, sold this cotton to several joint purchasers, on the 26th of the same month and year, for \$100,000; but, unable to deliver it, on account of the attachment, it brings this suit against the defendant, alleging that his proceeding in Alabama is illegal and unwarranted; that the bank is in liquidation under an order of Gen. Banks, dated the 13th of June, 1863, during the military occupation of New Orleans by the Federal armies; that, by this order, the bank was declared insolvent, and that all its property and assets

of every description, and all its affairs of whatsoever nature, were placed under the control and management of commissioners of liquidation, as provided for by law in insolvencies of individuals; that the bank has, ever since the date of said order, been in due course of liquidation; that, in consequence of this insolvency, the creditors of the bank can only be paid pro rata shares of its debts, after its assets have been converted into current funds and ready for distribution; that defendant Wilson has no right to be paid in preference to other creditors, or to be paid out of any particular portion of the assets. The plaintiff therefore prays that the defendant be restrained by an injunction from taking any further action under the attachment proceeding begun by him in Alabama; that he be required to dismiss the attachment and to restore the cotton to the possession of plaintiff, upon the plaintiff's giving bond, with solvent security, in such sum as the Court may determine, to secure the payment of such damages as said Wilson (who is alleged to be a citizen of Louisiana) may sustain, in case it should be decided that the injunction was wrongfully obtained. The plaintiff further prays, that the defendant be commanded by injunction to institute his action against petitioner, the said bank, in a competent Court in Louisiana, within three months from the date of the filing of plaintiff's suit against defendant, to settle his rights against it. And, lastly, if the attachment sued out in Alabama shall not be dismissed, and the cotton attached restored to plaintiff, that judgment be rendered against defendant, in favor of plaintiff, for \$100,000, the value of the cotton, and \$20,000 damages, with interest from judicial demand.

The injunction was issued, as prayed for, and personal service of the same and of the petition was made on defendant, who thereupon, when the case came on for trial in the Court below, moved that the injunction be dissolved, on the following grounds:

1. That the Bank of Louisiana is without capacity to institute this suit, and therefore cannot stand in judgment.
2. That no sufficient injunction bond was given.
3. That the affidavit to obtain the injunction is insufficient.

On the trial of the rule the injunction was dissolved, and plaintiff has appealed.

This suit is brought by the Bank of Louisiana, a corporation of the State of Louisiana, created by law and established in the city of New Orleans, and now in liquidation, and represented by Ambrose Lanfear, J. W. Burbridge and George Ruleff, commissioners of liquidation for said bank. It is distinctly set out in the petition that the bank is insolvent and in process of liquidation, and the liquidators are named. The insolvency of the bank and its state of liquidation is alleged as the basis of the action against defendant, and the ground upon which it prays that defendant be restrained from prosecuting his claim against the property of the bank.

It is contended in argument by the counsel of the bank, that the military order declaring the insolvency of the bank, and appointing commissioners of liquidation to take charge of its assets, had not the effect to dissolve the corporation, and that no judicial decree has been rendered establishing the forfeiture of its charter. We see nothing requiring from us an opinion on this subject. If the corporation was not dissolved by

the military order, its validity is recognized and accepted by the bank, to the extent of the insolvency declared, and the appointment of liquidators to take possession of its property and to settle its affairs.

In the case of *French and another, Commissioners, v. Landis et al.*, 12 Rob. 634, the Supreme Court said: "The analogy is striking between an insolvent who has made a *cessio bonorum* and a corporation put in liquidation by virtue of the act of 1842. All the property, rights and actions of the insolvent become vested in his creditors, to be administered by the syndic. It never has been supposed that an insolvent, after his surrender, could maintain an action against a faithless agent or mandatory. Such an action, and even a right to maintain revocatory actions, passes to the syndic, and can be maintained by him alone for the benefit of the creditors. By the decree of forfeiture the corporation has no longer the faculty of suing in its corporate name."

If, as held by the plaintiff, the corporation still has vitality, and retains the capacity to sue and be sued, there would seem to be an anomaly growing out of the existence, at the same time, of a corporation and commissioners to liquidate its affairs, both having the power to control its assets, and equally the power to exercise all its rights of action in courts of justice. But no such anomaly, we apprehend, exists. There being commissioners appointed to liquidate the business of the insolvent bank, they are the proper representatives of the creditors, whose interests it is the duty of the liquidators to protect, and in their names should all judicial proceedings, in relation to the rights of the creditors, be taken. On the other hand, if the corporation still exists, and has the capacity to institute suits, this action should have been brought in its corporate name. But, if the capacity of the bank to stand in judgment were left an open question, we think the injunction bond defective, and this alone would present a bar to the prosecution of this suit.

The bond is executed in the name of the bank, by the attorney-at-law of the bank, and by Ambrose Lanfear as surety. It is not essential that appeal bonds be signed by the principal; and the reason is obvious. But the same reason does not apply to injunction bonds. The defendant had the right to require a bond from the plaintiff, or some one duly authorized to execute it for him. 12 An. p. 418. The attorney-at-law could only execute the bond in the absence of his client, and the client in this case was not absent. There is, moreover, doubt, whether the authority granted to attorneys-at-law, to execute bonds in such cases, extends to corporations. There is a special law in regard to corporations, which limits their official acts to certain agents, and an attorney-at-law is not one of these agents. C. P. Art. 112. C. C. Arts. 428, 429 and 430.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

NO. 1,015.—THE STATE OF LOUISIANA, ex rel. LOGAN & MACKINSON, v. THE JUDGE OF THE FOURTH DISTRICT COURT OF NEW ORLEANS.

Where the District Judge renders judgment on a rule to show cause why execution should not issue, dismissing the rule, a *mandamus* will not lie to compel him to order an execution. The decision, on the rule, is a judgment of the Court, which can only be inquired into on appeal.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J. B. Egan*, for Logan & MacKinson. *Judge P. E. Théard*, in propria persona.

LABAUVE, J. The relators have applied to this Court for a writ of *mandamus* directing the said District Judge to show cause why a peremptory *mandamus* should not issue, compelling him to allow the relators a writ of *feri facias* on their judgment against John F. Low, and others, No. 17,619 of the docket of the Fourth District Court of New Orleans.

They represent that they have obtained a judgment in the honorable the Fourth District Court of New Orleans, on the 13th November, and signed on the 17th of same month, 1866, against John F. Low and others, for \$1471 12, with legal interest and costs of suit; that said judgment is now final, and no appeal has been taken thereupon. That on the 13th of December, 1866, they applied to the clerk of said District Court for a writ of *feri facias* on said judgment, and that the said District Judge wrongfully refuses to permit the clerk of the said Court to issue a writ of *feri facias* in favor of the relators, and against the said John F. Low and others, on said judgment, by reason of which the relators have sustained a denial of justice. They pray accordingly.

The rule issued as prayed for, and the said District Judge has answered that:

"On the 30th day of October, 1866, the Foundrymen's Coöperative Association filed a petition, and, for certain causes therein alleged, prayed for the dissolution and liquidation of said corporation, and further prayed for a judicial order decreeing that all proceedings against the said corporation be stayed.

On the 31st day of October, 1866, the said District Court of New Orleans granted said stay of proceedings, and appointed a receiver and liquidator as in cases of insolvencies, and this respondent, Judge of the said Court, signed the said order on the 31st day of October, 1866, which order, a copy of which is hereto annexed, is and still remains in force.

Logan & MacKinson instituted a suit in the Fourth District Court of New Orleans, in the month of August, 1866, against the Foundrymen's Coöperative Association aforesaid, a copy of the petition and citation are hereto annexed, and made part of this answer.

On the 13th day of December, 1866, the plaintiffs in said suit, Logan & MacKinson, through their attorney, B. Egan, applied for a writ of *feri facias*, which was refused, and, at the suggestion of the Court, took a rule on D. A. Mullane, the receiver appointed by this Court in the case of said corporation, to show cause why a writ of *feri facias* should not issue.

The State, ex rel. Logan & MacKinson, v. The Judge of the Fourth District Court.

The rule was tried contradictorily with the said receiver, and after hearing evidence and argument, the Court ordered, "that this suit of Logan & MacKinson be transferred to and consolidated with the case No. 17,789 of the docket of this Court, entitled the Foundrymen's Coöperative Association, praying for a dissolution and liquidation, and that said rule be dismissed with costs, a copy of which order is hereto annexed, and is still in force.

The suit of Logan & MacKinson, was a suit against the said Foundrymen's Coöperative Association, and at the time the order of stay of proceedings was granted and signed, the said Logan & MacKinson had not recovered judgment. All proceedings had, after such stay of proceedings had been granted, were absolute nullities. 1 M. 193, 207; 3 M. 39; 7 R. 162; 3 An. 582, and numerous others on the same point.

On the trial of the rule, these positions were taken, and the Court sustained the well-established jurisprudence of the State on that point.

The judgment of the said Logan & MacKinson is a mere and absolute nullity.

The fact of the existence of the order of stay of proceedings, escaped the recollection of the Court, at the time that the judgment referred to in the petition praying for a *mandamus* was rendered, otherwise said judgment could not have been rendered and signed by the Court. *A judgment is improperly signed after a stay of proceedings, and the suit should be cumulated with the concurso.* 4 N. S. 625; 7 L. 62; 2 An. 634. And it was the duty of the plaintiffs to have respected said order.

It will be borne in mind that the rule to show cause why the writ of *hæri facias* should not issue, and of which a copy is hereto annexed, was taken at the suggestion of the Court by the attorney of the petitioners herein, and that the alleged judgment obtained by him, is considered as a judgment against the Foundrymen's Coöperative Association, and not an individual judgment against any particular individual.

The citation hereto annexed, shows that it was addressed to said association in their corporate capacity.

Articles 418 to 422, inclusive, of the C. C. define what a corporation is, and Articles 423 and 428 provide the mode in which they may sue or be sued.

John F. Low, against whom the judgment was rendered, was served with a citation as representing the company, and the said citation was not directed to him in his *own individual capacity*; therefore, the judgment rendered is one against the Foundrymen's Coöperative Association, and not against an individual member. 3 An. 19, 541. What purports to be a judgment is therefore a nullity.

Besides, even if the petitioners had obtained a judgment against the association before the order of stay of proceedings, the injunction would apply as well, for the association being dissolved and in liquidation, necessarily all the suits against it must have been cumulated and carried on in the insolvent proceedings. See cases already cited. 3 M. 39; 4 N. S. 625; 7 R. 162; 2 An. 634.

I apprehend that the petitioners have mistaken their remedy, if any they have; that is to say, they should appeal from the interlocutory order



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or decision of this Court, in the matter of the rule to show cause why execution should not issue.

For these reasons it is humbly submitted that no writ of *mandamus* should issue as prayed for.

Respectfully submitted,

(Signed)

PAUL E. THEARD, Judge."

It is perceived that our learned brother of the Fourth District Court of New Orleans, has given satisfactory reasons why the *mandamus* prayed for should not issue, and the said Judge has gone further than necessary; and has concluded right, in saying that the relators should have appealed from his decision in the matter of the rule to show cause why execution should not issue.

The question on the propriety or illegality of that decision, is not before us; it is on an appeal only that we could inquire into the proceedings of the rule and decision thereupon, which the said Judge has brought up and annexed to his answer, to show why he had refused to allow an execution to issue.

On the 13th December, 1866, on motion of B. Egan, attorney for plaintiffs in the case of *Logan & MacKinson v. John F. Low, and others, etc.*, in the Fourth District Court of New Orleans, presided by the said Judge, it was ordered by the Court that D. A. Mullane, receiver in the case of the Foundrymen's Coöperative Association, do show cause, on Friday, the 14th day of December, 1866, at 11 o'clock, A. M., why a writ of *hæri facias* should not issue in the said cause.

On the said day, the said rule came on for trial, and the following decision was rendered by the Court:

"It is ordered that this suit be transferred, and consolidated with the case No. 17,989 of the docket of this Court, entitled the Foundrymen's Coöperative Association, praying for a dissolution and liquidation, and that said rule be dismissed, with costs."

It seems, from the Judge's answer herein, that no appeal has been taken from that order, and that the same is yet in full force.

It is the relators who called upon the Court to decide whether they were not entitled to an execution in the case alluded to, and, instead of taking an appeal from that decision, or submitting to it, they applied again, notwithstanding the said order refusing it, to the same Court for an execution, which the Court was bound to refuse as long as the said decision in the matter stood as a decree of the Court. Whether the decision was right or wrong, it made no difference; the Court and the parties were bound by it. This is no case for a *mandamus*; we cannot direct the said Judge to allow an execution to issue; it would be virtually annulling his decision refusing it, and upon which we have jurisdiction by appeal only.

The rule is dismissed and the *mandamus* refused, at the cost of the relators.

## No. 6,920.—M. L. ROSSVALLY v. THE CITY OF NEW ORLEANS.

Where a party, contracting with the City of New Orleans to clean the streets, allows to be inserted in the contract a clause, that in case of failure to perform the work specified, at the proper time, the street commissioner shall cause the work to be done at whatever cost he may be able to obtain the labor and material, and to deduct the expense thus incurred from the amount due by the city to the contractor, such clause is valid and binding upon said contractor.

**A** PPEAL from the Fifth District Court of New Orleans. *Eggleston, J.*  
*J. J. Lugenbuhl and E. Planchard*, for plaintiff and appellant. *J. J. Michel*, for defendant and appellee.

**LSLEY, J.** By a contract entered into on the 11th August, 1859, between the plaintiff, M. L. Rossvally, and the defendant, the city of New Orleans, the latter undertook to do and perform certain works, such as cleaning the streets and keeping in repair the unpaved streets of the Eleventh Ward, Fourth District of the city, as particularized in the specifications, for and during the term of three years, and, in consideration therefor, the city was to pay the plaintiff the sum of four thousand four hundred dollars per annum, in monthly installments of three hundred and sixty-six dollars, sixty-six and two-thirds cents—of which ten per cent. was to be retained until the end of each year, and then paid, if the streets were found in good order and condition, otherwise to be forfeited to the use of the city.

To insure the diligent and faithful performance of the works undertaken by the plaintiff, the city caused to be inserted into the contract several other stringent clauses, among which is the following: "In all cases, if the contractor fails to perform or neglects his work, the street commissioner is bound to do it, or cause it to be done, at whatever cost he may be able to obtain the necessary materials and labor, and the amount of the fines, the wages of the workmen and the cost of the materials, are to be deducted out of the monthly payments to be made to the said contractor."

The contract, by the mutual consent of the parties, was annulled on the 10th December, of the same year; and the plaintiff claims in this suit, under his contract, the balance of one thousand and six dollars and interest, for work performed by him up to its termination.

The city pleaded the general issue, and payment of the installment for September.

Judgment was rendered against the defendant in the District Court, and he has appealed.

The plaintiff contends that his part of the contract, up to the time of its annulment, was faithfully and diligently performed, whilst the city maintains that the work was neglected, and not performed in accordance with the stipulations of the contract; that the plaintiff's work was totally abandoned for a whole month, out of the time for which he claims payment; that he did not personally supervise the work, and that he failed to carry out the orders of the street commissioner. Who was, therefore, by the terms of the contract, required to cause the work to be done; and that for the work so ordered to be done by the commissioner, large sums of money were paid by the city; and, that under the clause to which we

have referred, the sums so paid must be deducted from the monthly installments.

The city thus states its account with the plaintiff:

Allowing the full amount for the three months and ten days, without the deduction of the ten per cent., it would be.....	\$1,222 12
Deduct the amount paid to the plaintiff, which is admitted.....	216 00
Work done by the city in September, and paid for..	114 00
Work done by the city in October, and paid for.....	864 18
Work done by the city in December, and paid for...	323 00
	\$1517 18

Amount overpaid.....\$292 96

That these several amounts were paid by the city on account of the work undertaken by the plaintiff, cannot be questioned; but, they are not chargeable to the plaintiff, if he has done his work faithfully, and in accordance with the specifications of his contract.

To ascertain this, we have carefully examined all the evidence in the record, and it fails to establish the plaintiff's pretensions.

The Ward in which the plaintiff's work was to be performed, was a large one, containing some twenty-five squares, making some thirty or forty streets; and it would have required, says the street commissioner, not five (about the average number employed by the plaintiff on the work) but from fifteen to eighteen men, to do all that was required by the specifications.

The plaintiff's witnesses concur in saying that the number of laborers employed by the plaintiff would have sufficed for the work, had sufficient time been given them to do it. But none of these witnesses knew what work was required by the specifications.

The only witness who had seen the specifications published was Patrick Irwin; but he says that he did not inspect the work close enough to say if the plaintiff had earned his money.

The street commissioner, who knew what was required by the specifications, although he did not recollect having read the contract itself, says that the plaintiff did not, at any time, perform his obligations under his contract (meaning thereby under the specifications of the contract which he had read); that he failed to cut grass from the banquettes, clear the gutters, grade the streets and pile the dirt—a work which required prompt and efficient performance, and which needed two-thirds more labor than the plaintiff had at any time engaged upon it.

We are satisfied that, although the plaintiff did make some progress in his work, that he failed to perform what was called for by the specifications of the contract; and as he was legally put in default (see Art. C. C. 1905; 17 La. p. 310), the city was authorized, under the clause transcribed herein, to do the work neglected or left undone, at whatever cost the commissioner could obtain the necessary labor.

It was the plaintiff's misfortune to undertake the extensive works required by his contract with the city, for one-half their value; but, having accepted the stipulated consideration therefor, and subscribed to all the stringent clauses which the city, in view of the public interest, deemed necessary to secure the performance of the contractor's obligations, he

Rossavally v City of New Orleans.

must abide by them (see Art. 1895 C. C.), as Courts are bound to give legal effect to all legal contracts, according to the true intent of the parties. Art. 1940, § 2.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellants.

## No. 6,956.—FARLEY, JURY &amp; Co. v. J. C. VANWICKLE &amp; Co.

Where defendant shows that cotton was damaged before he was authorized to take possession of it it is incumbent on plaintiff to show that other damages were sustained, and the extent thereof before he can recover.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
T. J. & A. G. Semmes, for plaintiffs and appellants. Collens & Wool-  
dridge, for defendants and appellees.

HYMAN, C. J. In this case the plaintiffs are appellants from a judgment of nonsuit.

The suit is for damages alleged to have been done to cotton, while in charge of defendants, under an agreement that they should take charge of, haul, store and protect it from injury.

The evidence is, that the cotton was damaged before defendants were authorized to take charge of it, and this fact being established, it is our opinion that it devolved on the plaintiffs to show, by evidence, that the cotton received other damage, and the extent thereof, while it was in the charge of the defendants. This was not so done as to enable the District Judge to give a judgment for any amount in favor of plaintiffs.

In examining the evidence, we have not come to a conclusion different from that of the judge.

Let the judgment be affirmed.

## No. 128.—R. MARSH DENMAN &amp; Co. v. M. H. DOSSON, J. P. TOND and W. D. L. McRAE.

A retiring partner of a commercial firm is not exonerated from responsibility for subsequent engagements made in the name of the partnership with persons previously in the habit of dealing with it, unless special notice of the withdrawal be given them.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J.*  
Clarke & Bayne, for plaintiffs and appellees. T. W. Collens, for  
defendants and appellants.

TALIAFERRO, J. The commercial firm of M. H. Dosson & Co., composed of M. H. Dosson and W. D. L. McRae, having business transactions with the firm of R. Marsh Denman & Co., during the years 1856-57, to the amount of \$1,871 with interest, there was a balance due the latter, on the 4th of November, 1857, of \$421 56. In liquidation of this sum, R. Marsh Denman & Co. received a promissory note, payable on the 10th

R. Marsh Denman &amp; Co. v. M. H. Dosson, et als.

day of February, 1858, drawn by M. H. Dosson & Co., payable to the order of, and endorsed by, J. P. Todd & Co. As owners and holders of this note, R. Marsh Denman & Co. caused it to be duly protested at maturity, and notices to be given to the several parties entitled to notice. They subsequently brought suit against the drawers and J. P. Todd, one of the endorsers. On the 2d March, 1860, judgment was rendered against Dosson, McRae and Todd, *in solido*, for the amount of the note, with eight per cent. interest from the 13th of February, 1858, costs of protest and costs of suit.

From this judgment McRae appealed.

The defense set up by the appellant is, that he was not, at the time of the institution of the suit, nor at the time the note was given, a member of the firm of M. H. Dosson & Co. He further denies that he, or any firm with which he was connected, has ever received any consideration for said note.

The evidence shows that the following notice appeared in the Commercial Bulletin, on the 10th of December, 1856 :

"Notice.—The undersigned this day retires from the firm of M. H. Dosson & Co., by mutual consent. (Signed) W. D. L. McRAE.  
New Orleans, December 10, 1856."

The appellant propounded a number of interrogatories to the plaintiffs, tending to show his withdrawal from the firm of M. H. Dosson & Co., but he entirely failed to elicit by their answers any knowledge whatever of that fact. Their answers declare that they were not subscribers to the Commercial Bulletin, and that they never saw the appellant's advertisement in the paper, nor ever knew of its being there; that they never learned from any other source that the appellant had withdrawn from the firm. They aver, moreover, that they took the note upon the credit of all the parties to it, supposing McRae to be a member of the firm of M. H. Dosson & Co., as they had had previous dealings with that firm.

It appears clearly that business relations existed between the two firms from July, 1856, until November, 1857. It seems to be the settled rule that, in a case like the present, a retiring partner is not exonerated from responsibility for subsequent engagements, made in the name of the partnership, with persons previously in the habit of dealing with it, unless special notice of the withdrawal be given them. A general notice in the newspapers does not suffice. 6 L. R. 683. 12 An. 773. Story on Partnership, §§ 160, 334, 335, 336.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.



## No. 6,838.—HALL, KEMP &amp; CO. v. S. PLASSAN.

The seller is bound to explain himself clearly, as to the extent of his obligations.

The exhibition of a sample implies a warranty that the thing sold by it shall be, in some measure, in conformity to it.

The sample is a tacit representation of the quality of the merchandise sold, and except where the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample.

Where merchandise is sold by a sample, the extent of the warranty is limited to the condition of the article sold at the time of the sale.

Where the commodity is by its nature, subject to change or deterioration, and no fraud or concealment is shown, the buyer must show that the defect or deterioration existed at the date of the sale, or show that it was discovered as early as it was practicable to make an examination.

**A** PPEAL from the Fourth District Court of New Orleans, *Priez, J.*  
*R. & H. Marr*, for plaintiffs and appellants. *Hunt & Denegre*, for defendant and appellee.

**HOWELL, J.** Plaintiffs allege that on the 30th January, 1858, they purchased of defendant, by sample, 1,016 cases of wine of superior common claret, then stored in a bonded warehouse; that on 28th of April following they discovered that said wine was sour, wholly unmerchantable, and altogether different in quality and condition from the sample exhibited to them, of which they gave immediate notice, and tendered the wine to defendant, who refused to accept the same, and thereupon they caused 999 cases (the number not disposed of by them) to be sold at auction, the net proceeds of which they credited on the cost price thereof, and they ask for judgment against defendant for the balance, and the storage paid by them.

The defense is a general denial. Judgment was rendered in favor of defendant, and plaintiffs appealed.

It is shown that a broker informed defendant that he had a purchaser for the wine, whereupon defendant sent his clerk to the warehouse for a sample; the clerk opened two or three boxes, took out sample bottles and carried them to defendant's store, whence the broker carried them to plaintiffs, who, with him, tried them and found the wine to be good "cargo wine," with an "artificial flavor;" plaintiffs were then informed that the wine was an entire shipment of a particular brand by one vessel. About two months thereafter plaintiffs withdrew from the warehouse 400 boxes of the wine, and a month later (say 27th April, being about three months after their purchase) they withdrew and sold 400 boxes more, when they, for the first time, discovered that the wine was sour, and different from the sample; the remainder was not taken from the warehouse until in July following, when 999 boxes were sold at auction. Wine of this grade, known as "cargo wine," in a very short time, say within three months after, becomes unmerchantable in this climate. In sales of such wines vendors guarantee the wine the length of time necessary for the purchaser to examine the lot purchased, and in this instance no particular guaranty was given. The defendant was unacquainted with the condition or character of the wine, having sold without examining it. It also appears that plaintiffs received the lot or shipment from which the sample was taken.

Hall, Kemp &amp; Co. v. S. Plassan.

It is a well-settled principle of law that a seller is bound to explain himself clearly as to the extent of his obligations; and the exhibition of a sample implies a warranty that the thing sold by it shall be in some measure in conformity to it. The sample is a tacit representation of the quality of the merchandise sold, and except where the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample. C. C. 2449; 1 N. S. 312; 4 R. 316; 10 R. 5.

The extent of this warranty is limited, however, to the condition of the article sold at the time of the sale; and where the commodity is by its nature liable to change or deterioration, and no fraud or concealment is shown, the buyer must prove that the defect or difference existed at the date of the sale, or must show that it was discovered as early as it was practicable to make an examination, or under such circumstances as to raise the presumption that it must have existed at the time of the sale.

Applying these principles to this case, we think plaintiffs have failed to show that the wine was unmerchantable or different from the sample at the date of the sale. On the contrary, the evidence raises the presumption that a change in its condition occurred after the delivery.

It was a low, cheap grade of claret, called "prepared" or "cargo wine," of which experienced dealers say, "you cannot depend with any certainty that it will keep for any length of time." There was no effort nor design to practice a deception in selecting the sample bottles, which were taken from different boxes indiscriminately. The sample was exhibited, and agreement made on 12th January—the note for the price given on 30th same month. On 24th March the plaintiffs removed 400 boxes from the warehouse, and on the 27th April following 400 boxes more, the purchaser of which examined the wine on the next day and found it sour, and complaint was then first made. We think the warranty did not continue such a length of time, under such circumstances, and the District Judge did not err in giving judgment for defendant.

Judgment affirmed.

#### No. 751.—D. SULLIVAN v. E. GOLDMAN.

Where plaintiff has established his ownership up to a particular date, the burden is on defendant, or those through whom he holds, to show a legal divestiture of plaintiff's title. The warrantor cannot be condemned to pay more than the price recovered by him, no damages being proved.

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J.* A. Saucier, for plaintiff. Durant & Hornor, for defendant. C. Redmond, for P. Dopf, called in warranty.

**HOWELL, J.** This is an action to recover a horse, or his value, found in the possession of defendant, and alleged to have been stolen from plaintiff. The defendant pleads a general denial, and calls in warranty his vendor. Judgment was rendered against defendant for the horse or his

D. Sullivan v. E. Goldman.

value, fixed at \$350, and the same judgment was rendered in his favor against the warrantor, and both have appealed.

Plaintiff has shown that he was the owner of the horse in question, for several years prior and up to about the 10th or 12th day of May, 1864, when he disappeared from plaintiff's stable at night, and was not heard of until in April, 1865, when sequestered in the possession of defendant in this city, who shows that he purchased him in the latter part of February, 1865, for a valuable consideration, from one Phillip Dopf, a dealer in horses in this city, who bought him on 16th February, 1865, from one P. D. Byrne. From whom the latter purchased him is not shown. It seems that the horse disappeared from the premises of plaintiff, in Alexandria, in this State, when the army under command of Gen. Banks evacuated that place; and it is contended in argument that the horse must be presumed to have been impressed for the use of the army or an army officer. There is nothing in the record to support such a presumption, and as plaintiff has established his ownership up to a particular date, the burden is on defendant, or those through whom he holds, to show a legal divestiture of plaintiff's title. Under the circumstances presented by the evidence, the presumption of ownership arising from the possession of a movable does not avail defendant or his authors.

We think, however, the proof does not sustain the value fixed by the lower Court. The weight of evidence fixes \$300 as the value; and we do not think the warrantor should be condemned to pay more than the price recovered by him, no damages being proven. C. P. 385. We ascertain this price from the allegations in the call and answer in warranty, which, taken together, will authorize a judgment for \$200 only against the warrantor.

It is therefore ordered that the judgment appealed from be reversed; and it is now ordered that plaintiff recover of defendant the bay horse sequestered herein, or his value, \$300, with privilege on the same and costs of suit in the lower Court; and it is further ordered, that defendant have judgment against Phillip Dopf, called in warranty, for the sum of \$200, with all costs in the lower Court, costs of appeal to be paid by plaintiff and defendant jointly.

No. 244.—JULIUS WILLIS *v.* DAVID MELVILLE.

In an action on a *quantum meruit*, the defendant may show that there was a verbal or written contract between the parties; and if a contract really existed, the plaintiff, who sues on a *quantum meruit*, cannot recover.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*Race & Foster*, for plaintiff and appellant. *W. S. Stansbury*, for defendant and appellee.

**LISLEY, J.** The plaintiff claims on a *quantum meruit*, for services rendered by him to the defendant, as his traveling agent and salesman, during twenty months—between the 27th February, 1855, and the 27th

Julius Willis v. David Melville.

October, 1856, at the rate of one hundred and twenty-five dollars per month, the sum of twenty-five hundred dollars.

Also, the sum of one hundred and thirty dollars, the price of a gold watch, belonging to the plaintiff, and deposited for him with the defendant.

The general issue is pleaded, and a special contract, in regard to the plaintiff's services, is set up and relied on to defeat his claims.

That such a contract existed between these parties, is proved by the plaintiff's own witnesses; and it is shown that previous to the institution of this suit, the plaintiff always insisted on a settlement in accordance with his contract with the defendant.

The plaintiff's present action cannot therefore be maintained, as it would force judicially upon the defendant a liability different from that which he specially assumed by his agreement with the plaintiff, and which has the effect of law on both the contracting parties (C. C. 1895), and to which legal effect must be given. 1940 C. C.

The true rule of pleading is enunciated, in this particular, in the case of *Hogan v. Gibson*, 12 La. 459, and we adopt it as applicable to the present case.

There is, however, no connection between the contract and the sum of one hundred and thirty dollars claimed by the plaintiff; and for this sum he is entitled to a judgment.

The claim of seventy-five dollars, set up by the defendant as a reconventional demand, is connected with the agreement above alluded to, and cannot therefore be now allowed.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the plaintiff's claim for personal services be dismissed, as in case of nonsuit; and that he have judgment against the defendant for the sum of one hundred and thirty dollars, with legal interest from the 9th May, 1855, and the costs of suit in both Courts to be paid by the appellee; and it is further ordered, that the defendant's claim in reconvention for seventy-five dollars be dismissed, as in case of nonsuit, at his costs.

No. 832.—SUCCESSION OF ANGELO COSTA—On Petition of CLARA CORDENO and Others, for the Annulment of Usufruct.

The marital portion given by Article 2339 of the Civil Code comes from the separate property of the deceased spouse.

The community property springs from the joint labor, economy and care of the husband and wife.

The statute of 1814, § 2, gives to the surviving spouse the usufruct of the share of the community property of the deceased during the natural life of the usufructuary, without giving security. It is subject to the sole condition, that the survivor does not contract a second marriage.

**A**PPEAL from the Second District Court of New Orleans, *Thomas, J. C. Dufour*, for plaintiff and appellant. *Hunt & Denegre*, for defendant and appellee.

**TALLIAFERRO, J.** Angelo Costa died in New Orleans, in the year 1858,

## Succession of Angelo Costa.

intestate, leaving a widow and six children, five of whom, at that time, were minors. He left a considerable estate, consisting of real and personal property. His widow, Marie Costa, had the usual legal proceedings taken in regard to the succession, which consisted entirely of community property. She was confirmed as natural tutrix of her minor children, and an under tutor was appointed. Availing herself of the provisions of the act of the Legislature, entitled "an act relative to community property," approved March 25th, 1844, she took possession of the entire estate, holding the undivided half in usufruct. She administered the property as tutrix, sold a part of it under the advice of a family meeting and an order of Court, and filed an account, which was duly homologated, in July, 1859.

In 1865, several of the heirs, then of the age of majority, instituted this proceeding, praying that the usufruct of the mother be annulled, or that she be required to give security for the faithful and proper administration of the property, setting forth that her administration of the estate has been improvident, wasteful, and greatly injurious to the petitioners.

The defendant, Madame Costa, by her counsel, filed an exception to the proceeding taken against her, averring that the petition set forth no cause of action; that no specific allegation of waste of the property, or of illegal or wrongful management of it, is made, and that she is not required by law to give the security demanded by the plaintiffs.

The case was decided in the lower Court on the exception. Judgment was rendered against the plaintiffs, and they have appealed.

It is contended, on the authority of the case of *Conner v. the Heirs of Conner*, 13 An. 157, that the legal usufruct treated of in Art. 553 of the Civil Code, is that referred to in the Arts. 239, 240 and 241 of the Code, and hence the deduction, that the only usufruct of children's property free from the obligation of security, is that which is accorded to the parents during marriage; and that the usufructuary of the marital portion, decided by that case to be bound to give security, is in a condition analogous to that of the defendant in this case. The reason on which the distinction drawn, in the case of *Conner v. the Heirs of Conner*, seems to rest, does not, in our opinion, apply to the case before us. The marital portion, given by Article 2359 of the Civil Code, comes necessarily from the separate property of the deceased spouse. It is conceded to the survivor left in destitution, from the estate of the partner dying in opulence. It is a concession to the needy recipient, who never contributed by labor and industry to the acquisition of the means from which the bounty is derived. The community property, on the contrary, proceeds from the joint labor, economy and care of the husband and wife; and the survivor in community, therefore, to whom the usufruct is granted, would appear to have an equitable right to enjoy the privilege free from onerous conditions. A fair construction of the several Articles of the Code, brought into view in the argument of this case, hardly sustains the position, that it is only during marriage that parents can hold the usufruct of their children's property, without furnishing security. Article 241 directs that "the usufruct, in case of separation from bed and board, shall take place in toto in favor of either father or mother, who shall have obtained such



separation, and shall be subject to the conditions prescribed in the preceding article."

If the entire usufruct may be enjoyed by one of the parties to the marriage, without the condition of security, when separation from bed and board occurs, why may it not be, after a final dissolution of the marriage by death or divorce? It is true that, by Art. 239 of the Code, the duration of the usufruct is limited to the time at which the minors attain the age of majority, or are emancipated. But, as regards the legal usufruct, established long afterwards by the statute of 1844, second section, the lawgiver has seen proper to extend its duration during the life of the usufructuary. It is subject to the sole condition that the survivor holding the usufruct, loses the right by contracting a second marriage. No security is required; nor do we consider, in view of the humane and liberal spirit in which the law was enacted, that it was intended to be required. Being a legal usufruct established for the benefit of the surviving parent, we think the provisions of Article 553 of the Civil Code apply as well to it as to the previous Articles of the Code; and that the usufructuary, under the law of 1844, is not required to give security for the usufruct.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

508.—ALFRED KEARNEY v. J. O. NIXON—THOMAS P. MAY & Co., Garnishees

A simulated or fraudulent title cannot be attacked by the process of garnishment.

**A** PPEAL from the Second District Court of New Orleans, *Howell, J. G. L. Bright*, for plaintiff and appellant. *J. Ad. Rozier*, for defendant and appellee.

**TALIAFERRO, J.** The plaintiff, setting himself out as the creditor of defendant (an absentee) in the sum of ten thousand four hundred dollars, with interest, as evidenced by four several promissory notes described in his petition, took out an attachment against his debtor, and cited Thomas P. May & Co., as garnishees, to whom he propounded the following interrogatories, viz:

1. Who compose the firm of Thomas P. May & Co.? What is the interest of each member of the firm? Is the agreement of partnership in writing? If yea, annex it to your answers.

2. Are you in possession of the establishment situated on Camp street, and formerly known as the Crescent newspaper, and now known as the New Orleans Times?

3. What does the establishment consist of? State the amount of type, presses, engines, and all other materials now used in the establishment known as the New Orleans Times newspaper, that formerly belonged to, or was used in, the Crescent newspaper establishment, before it became the New Orleans Times. Does not the value of the property exceed \$15,000; if nay, what is its value?

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4. Did you ever acquire, by purchase or otherwise, from any person, any of the property, type, materials, presses, engines or furniture, that belonged to J. O. Nixon, or were used by him in publishing the Crescent newspaper? From whom did you acquire them? Did you receive any bill of sale or receipt therefor?

5. To whom did Jacob Barker sell the aforesaid establishment? Have you the bill of sale or receipt given by him? If yea, annex it to your answers. From whom did Jacob Barker acquire, and from whom did his vendor acquire, the property in said establishment?

The garnishees filed an exception, assigning various reasons why they should not be required to answer the interrogatories, the more weighty of which reasons are, that the interrogatories are not pertinent, and that they are covertly intended to attack the title of garnishees to certain property—a mode of proceeding which is irregular and illegal.

The exception was sustained, and the garnishees dispensed from answering the interrogatories. The plaintiff has appealed.

The Articles 246 and 247, of the Code of Practice, define the rights of the creditor, in regard to third persons having, or supposed to have, in their possession property of, or who may be owing, the debtor against whom the creditor is proceeding. The third party or garnishee may be made a party to the suit, and cited to declare on oath what property belonging to the defendant he has in his possession, or in what sum he is indebted to such defendant, and whether the debt which he owes the defendant is due or not.

The plaintiff, by his interrogatories, does not inquire of the garnishees if they have property belonging to the defendant in their possession, nor if they owe the defendant anything. The pertinency of the interrogatories is not apparent. If, as their tenor would seem to indicate, the plaintiff suspected the garnishees held, under simulated or fraudulent titles, property really belonging to the defendant, he could not reach it by garnishment.

The judgment of the lower Court, sustaining the exception, we think correct.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HOWELL, J. recused.

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No. 803.—E. J. FOLTIER v. SCHRODER & SCHREIDER.

A forged endorsement on a negotiable bill of exchange passes no title to it, even to an innocent endorser, and the holder can recover the amount from the drawer, without alleging and proving the payee's endorsement.

It is a well-settled principle of law, that an action can only be maintained on notes or obligations by those in whom the legal title is vested.

When a bill of exchange is made payable to plaintiff, or order, the title to it is in him; and, to divest him of it, a transfer from him or his endorsement is necessary.

Delivery is of the essence of the contract of pledge or pawn, as a collateral or security.

**A**PPPEAL from the Sixth District Court of New Orleans, *Duplantier, J.*  
*A. Robert and J. L. Tissot*, for plaintiff and appellant. *Durant &*  
*Barnor*, for defendants and appellees.

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ILSLEY, J. The plaintiff, who is the payee and holder of the first of the set of a foreign bill of exchange, duly protested for non-acceptance, with notice to the drawers, the defendants in this suit, claims from them the amount of it, with damages and interest.

The answer is a general denial, and there is also a special defense.

The action was dismissed by the Court below, because the third bill of the set was not produced or accounted for by the plaintiff.

The doctrine upon which the decision was rendered is, when applied to a state of facts, such as that presented in the case of *Wells v. Whitehead*, 15 Wend. 527, the correct one on principle; and, if in this case it could be properly applied, it would be unnecessary to examine the other issues raised.

The plaintiff produces the first bill of the set of exchange, duly protested for non-acceptance by the drawee, with notice to the drawers; and this, upon the authority of *Downes v. Church*, 13 Peters, 205, establishes a *prima facie* title in him as the payee, which, however, may be displaced by the defendants, if they can show that the holder of any other of the set may recover on it.

This is a matter of defense, as the law will not presume that the other bills of the set have been negotiated to other persons, and the defendants, therefore, on the trial of the case in the lower Court, showed that the third bill of the set (a copy of which, with the protest annexed, is in the record) was the first one protested for non-acceptance.

As the third bill is out, and purports to bear the endorsement of the payee, the plaintiff in this suit, he cannot maintain his action without producing or accounting for this third part, or making satisfactory proof that the payment to him of the bill declared upon will, in accordance with its tenor, exonerate the defendant from all legal liability hereafter to any holder of the other bill.

It is proved, and admitted by the defendants, that the plaintiff never saw the third bill, and that his name endorsed on it is a forgery. Now, as a forged endorsement of a negotiable bill passes no title to it, even to an innocent endorsee (see *Jackson v. The Commercial Bank of New Orleans*, 2 Rob. 129, and *Dick v. Leverich*, 11 Rob. 173), and no holder of this third bill could recover the amount of it from the drawers, without alleging and proving the payee's endorsement, the defendants therefore, can have nothing to apprehend from any claim which a holder of it might hereafter assert; particularly, as they allege in their answer that the bill was overdue as soon as the first protest was made.

It is a well-established principle of law, that an action can only be maintained on notes or obligations, by those in whom the legal title is vested; but, in the present case, with proof in the record that there is no endorsement on it by the payee, the plaintiff has a standing in Court, and his action upon the first bill of the set should not, for the reasons assigned by the Court, have been dismissed.

The question to be determined in this case is, whether the plaintiff, who is the payee, for value, of the bill of exchange in suit, duly protested for non-acceptance, with notice, can be affected by an agreement in regard to the bill between the drawers of it, the defendants, and a third person,

who held the mere possession of it, without any transfer or endorsement from or under the payee ?

To solve this question, as it is here presented, it is necessary to advert to the principal facts which give rise to it. The plaintiff, the Abbé Foltier, received the *first* and *second bills* of the set from one Eugene Darolles, who purchased it from the drawers, and caused it to be made payable to the order of the Abbé Foltier, whose funds were invested in it, under the following circumstances : Darolles was to forward from New Iberia to New Orleans, and there to sell sixty bales of cotton for the Abbé, and to transmit the proceeds of sale to the Abbé's brother in France. Being, however, unable, from an uncontrollable cause, to attend to it, Dr. Darolles, his son, undertook the business, and effected a sale of the cotton ; but, deeming his father, who was in the city of New Orleans, the chosen friendly agent of the Abbé, and the proper person to terminate the transaction, he placed the proceeds of the sale in his hands, instead of depositing them with some designated person in the city, according to the Abbé's request. At the earliest practicable moment, the doctor informed the Abbé of the disposition he had made of the fund, and that his father had invested the Abbé's money for his account in a bill of exchange. Owing to the difficulty of passing through the military lines, it was only some time afterwards that the Abbé obtained an interview with Darolles, who confirmed the statement of his son, as to the receipt by him of the Abbé's money, and the purchasing for him and in his name, from the defendants, the bill of exchange now in suit ; and, as corroborative thereof, Darolles exhibited to the Abbé his memorandum book, wherein the whole transaction was noted, and placed in his hands the *first* and *second bills* of the set, the third being, as Darolles said, in his trunk, to be delivered afterwards.

The plaintiff and defendants being, as drawers and payee of a bill of exchange, the original parties to it, the consideration of it would, under the commercial law, be a fair subject of inquiry ; but the defense does not rest upon that, as the drawers received full value for the bill.

It grows out of an agreement in relation to it between them and Darolles, who had received from them seven thousand dollars, to be invested by him in the purchase, at Attakapas, of cotton and sugar, on joint account.

The defendants having but a casual acquaintance with Darolles, it was agreed between him and them that they should retain the bill in their possession, by way of collateral security ; but upon Darolle's representation, that the bill would be useful to him in his operations in the interior, the defendants permitted him to hold it, with the understanding, however, that he was not to part with it till they received sufficient produce to cover it.

The defendants have sued Darolles, to compel him to refund their money received by him, and in their petition in that suit, which is still pending in this Court, they aver that Darolles entirely failed to invest the fund placed by them in his hands ; and they now, as a defense in this suit, say that the bill of exchange in controversy is the property of Darolles, and not that of the Abbé, and that it is subject to their claim, of which, previous to the Abbé's receiving it, he was well aware, and also that they had ordered it to be protested.

A careful examination of the evidence in the record has convinced us that the bill was bought by Darolles, with the Abbé's money and for his use.

Nothing shows that he was conscious of any agreement, in regard to it, made with the defendants by Darolles, and as the Abbé was no party thereto, his right to claim the contents of the bill is incontrovertible.

Had the defendants a valid defense to oppose to the plaintiff's action, the intimation or notice by them, given to him, that they had ordered it to be protested, might be properly considered; but, satisfied, as the plaintiff was, that the defendants had received his money as the consideration of the bill, and that they had, by making him the payee of it, put the title to it in him, he may well have supposed that, if the drawees would not accept it, the drawers, who were solvent, would be bound, after protest and notice to them, to pay it.

But, what is the nature of the defendant's claim to, or upon the bill? Is it one of ownership, or a lien by way of privilege? The bill being payable to the plaintiff's order the title to it is in him, and, to divest him of it, a transfer from him or his endorsement would be necessary.

As a lien, by way of collateral security or a pawn, the bill endorsed by the payee should have been delivered to the pledgee, as delivery is of the essence of that species of contract. See act of 1855, No. 287, § 1; 8 M. R. 57; 17 La. 185, 428; 2 R. 277; 2 A. 338.

It was certainly in the power of the drawers of the bill, when confiding their money to Darolles, to impose upon him their own terms and conditions. Why then was the Abbé, and not Darolles, made the payee of the bill, and why did they not insist on the delivery of it to them?

It is very apparent, from this incautiousness on the part of the defendants, that they attached but little importance to the bill as collateral security for their money advanced to Darolles to invest, on joint account, in staple products. In their suit against Darolles, for the recovery of their fund, no allusion is made in their pleadings to this collateral security, and the remittitur for the amount of the bill in the body of the judgment, is so evidently an afterthought, as to render it unworthy of notice; and no greater weight can be attached to the entries in their books, which were improperly received as evidence for the defendants. See Article C. C. 2244.

The main reliance of the defendants to defeat the plaintiff's action is placing the title to the bill, not in the Abbé, but in Darolles, and to this end they direct our attention to the evidence given by the plaintiff in their suit against Darolles. Our interpretation of this evidence, which we reach, not from isolated phrases, but from its whole tenor, differs altogether from that put upon it by the defendants. It appears that the proceeds of the Abbé's cotton, exceeded in amount the sum paid for the bill, and to obviate all difficulty in a settlement with the Darolles, the Abbé was willing, if the bill was paid, to grant a full acquittance for the whole. The case of *Cannon v. Calhoun*, 10 An. 460, referred to by the defendants, is very different from this one in which the plaintiff's title to the bill is patent upon its face, whilst in the case cited, the note sued on was specially endorsed, not to the plaintiff, but to another person, and



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this would have been the position of Darolles, had he instituted a suit against the defendants.

The plaintiff is the legal holder for value of the bill drawn by the defendants, and his equity is greater than theirs, and their defense to his action cannot therefore prevail. "Where the loss has fallen there it must be," is an axiom of the law, its application, however, by the defendants, should have been made to their own condition, and not to that of the plaintiff.

The plaintiff is entitled to a judgment for the amount of the bill, twenty thousand francs, or the *admitted* equivalent in dollars therefor, (3.50 francs per dollar) say five thousand seven hundred and fourteen dollars and twenty-five cents, with damages, interest and costs.

It is therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed.

It is further ordered, adjudged and decreed, that the plaintiff, Eugene Jules Foltier, do recover from, and have judgment against the defendants, the commercial firm of Schroder & Schrieber, and against the individual members of the said firm, Antony Schroder and Christian Schrieber *in solido*, for the sum of twenty thousand francs (20.000f.) or the admitted equivalent therefor in United States money, (viz: 3.50 francs per dollar) say five thousand seven hundred and fourteen dollars and twenty-five cents, and as damages ten dollars upon the hundred dollars, upon the principal sum, above stated, with five per cent. interest upon the aggregate amount of the principal sum, and the damages thereon, from the seventh day of September, eighteen hundred and sixty-four, until paid. It is further ordered, that the defendants and appellees pay all costs in both Courts.

No. 6,955.—GEORGE G. EALER *v.* McALLISTER & Co.—THOS. H. JONES.  
Third Opponent.

Where an attorney-at-law brings a suit in his own name, as principal and owner: *Held*—That he cannot recover counsel fees as the agent of another. He cannot, in the same proceeding, claim to be the owner and the agent of the owner of the same thing.

**A** PPEAL from the Third District Court of New Orleans, *Duvigneaud, J. R. & H. Marr*, for plaintiff and appellant. *Simonds & Fenner*, for defendants and appellees.

HOWELL, J. This is an appeal by plaintiff from a judgment of the Third District Court of New Orleans, maintaining the third opposition of Thos. H. Jones, and ordering the sheriff to pay to the latter the amounts collected, or to be collected, under the original judgment herein rendered in favor of the plaintiff.

The main question is the ownership of the written obligation on which the suit is brought—a receipt given by McAllister & Co. in the name of George G. Ealer, for a sum of money on deposit.

George G. Ealer v. McAllister &amp; Co.

Our attention is called to several bills of exception, taken by plaintiff, to the ruling of the lower Court; but we think it necessary to notice only the one to the admission of the testimony of R. C. McAllister, the defendant, on the ground of a direct interest in the result of the suit. His interest is not a disqualifying interest. The contest is for a sum of money owed by him, and it is immaterial to him which of the contestants is successful, or to whom he has to pay. He is therefore a competent witness in this controversy. Other objections are urged to particular portions of his testimony; but, without them and similar testimony objected to, there is sufficient legal proof to establish, beyond any reasonable doubt, that Henry A. Ealer, the judgment debtor of Jones, is the real owner of the sum deposited with defendants. He is the party who made the deposit, took the receipt, at his own suggestion, in the name of his brother, received the two payments credited thereon himself, and always claimed and controlled the debt, until Jones, by a proceeding in a court in St. Louis, where the parties reside, attempted to attach it.

As the levying of the *fiery facias*, in the case of *Jones v. Henry A. Ealer*, in the Fourth District Court of New Orleans, was effectual in seizing the funds realized in this suit, it is unnecessary to inquire into the legality and effect of the other two modes adopted by the third opponent.

The claim or right urged in this Court, by George G. Ealer, to recover counsel fees for obtaining judgment and realizing the money in this suit, as the agent of Henry A. Ealer, is inconsistent with his pleadings and the position he occupies against Jones. He sued, and has contested throughout the litigation, as principal and owner; has denied that Henry A. Ealer has any interest, and persistently resisted the efforts of Jones to obtain the money as belonging to Henry A. Ealer. He cannot, in the same proceeding, claim to be the owner and the agent of the owner of the same thing.

Judgment affirmed.

#### No. 805.—SUCCESSION OF THOS. B. POINDEXTER.

A curator by refusing to take the oath of allegiance, and going beyond the jurisdiction of the proper authorities became *functus officio*, and lost all right to administer the property of the succession any further, and all claims to any commissions, except on sums recovered by him prior to the abandonment of his trust.

**A**PPEAL from the Second District Court of New Orleans, *Thomas, J. Roselius & Philips*, for curator and appellant. *Alex. T. Steele*, for opponent and appellee. *D. Augustin*, for absent heirs.

HOWELL, J. This appeal is taken by the curator of this succession from a judgment on his and other oppositions to an account, filed by Shepherd Brown, his predecessor in office.

The items opposed are:

1. Curator's commissions, \$13,989 48.
2. Notary's charge for inventory, \$500.
3. Fee of attorney for curator, \$3,000.
4. Fee of attorney for absent heirs, \$1,400.

I. Commissions are claimed on the value of the land, slaves, cotton and plantation movables, as appraised in the inventory made in the parish of Tensas, and a large quantity of corn not inventoried; the appraised value of vacant lots and other property not sold, and the proceeds of real and personal property sold in New Orleans, and the amount of several notes delivered to appellant.

The Court below allowed commissions to the amount of \$6,464, on the appraised value of the slaves, cotton, corn and mules in Tensas parish, and of the property in the city; and Brown, the appellee, asks that the judgment be amended so as to allow the first commissions charged.

The property of the succession was inventoried in September and October, 1861, upon the application of the attorney for absent heirs. Brown obtained letters of curatorship on 31st day of October, 1861, and, upon his petitions, real and personal property in New Orleans, was sold in November, 1861, and March, 1862, to the amount of \$54,713 55, and \$2,500, not inventoried, collected by him. After the 4th February, 1862, he does not appear in any proceedings in this record, until the 2d day of September, 1865, when being called on by the appellant, he rendered the account now opposed, with several statements and receipts for money paid without authorization from the Court.

In March, 1865, R. H. Bayley, the appellant, was appointed curator, and entered upon the administration of the succession. Brown does not question the regularity or legality of this appointment, but acquiesces by rendering the account, and obtaining an order of Court thereafter to turn over certain property and notes in his possession to Bayley, *as the curator*.

The slaves were emancipated in January, 1863; the cotton, inventoried in 1861, with that produced in 1862, was burned, and the corn raised in 1863, taken by hostile forces, and a large portion of the plantation movables taken off by the emancipated negroes, and other parties. The plantation seems to have been under the control of *vigilance committees* for two or three years.

The question presented by Brown for our solution, is: "If, after a curator has given bond for property, and has advanced large sums of money to protect it, the property is destroyed by a force superior to him and every person whom he represents, shall he be allowed commissions on the amount intrusted to him, and for which he gave his bond?"

We have to remark that there is no evidence in the record, that he advanced any money to protect the property, or that he gave any care or attention to that in the country. On the contrary, the record presents evidence of official delinquency, which, we trust, is unusual. A few months after his appointment he voluntarily abandoned his functions, left the city without appointing an agent or attorney to represent him, and *without taking the oath of allegiance necessary for the performance of his duties*, went into the Confederate lines, carrying with him the funds of the succession, and did not return until August, 1865.

By refusing to take the oath of allegiance, and going beyond the jurisdiction of the proper authority, he became *functus officio*, and lost all right to control or administer the property any further, and all claim to

any commissions, except on sums received or recovered by him prior to his abandonment of his trust.

We consider that he was out of office before the alleged destruction of the property, and as he does not show any acts of special administration thereon while in office, the solution of the question, propounded by him in the affirmative, will not benefit him. Articles 1187 and 1188 C. C. give the curator of a vacant succession, who has only partially administered, and whose term of office is to be extended, or who is to be replaced by another, commissions only on the amount he has received. See 3 A. 624, *Succession of Day*.

The only commission to which a succession can be subjected for its complete administration, is 2½ per cent. on the amount of the inventory, after deducting bad debts; and if, under the above principle, the appellee, Brown, had turned over the property to his successor, he would not be entitled to commissions thereon, his condition certainly would not be bettered by the destruction of the property, especially when it was destroyed and lost to the succession, after he abandoned his trust.

The corn, not inventoried, on which commissions are claimed, was raised in the year 1863, and of course not under his authority.

The cases cited by his counsel do not sustain his pretensions.

We think the District Judge erred in allowing commissions on the value of the slaves, cotton and plantation movables; and we are informed by counsel the commissions on the amount of the inventory in New Orleans have been paid by the heirs, who it appears have been put in possession of the estate, and are parties to this appeal. The sum thus paid should be increased by the commission on the \$2,500 not mentioned, but included in the account.

II. As regards the notary's charge there is now no controversy, as it has been reduced to \$100 by consent of all parties.

III. We are informed by counsel for the heirs, and it is admitted by counsel for Brown, that the fee of the latter has been paid with the assent of the heirs.

IV. In regard to the fee of the attorney for absent heirs, who, by opposition and by answer to the appeal demand its increase, we think the sum placed on the account for services during Brown's administration, far too high; but evidence is admitted of services rendered since, and considering the question of his full compensation, as attorney for absent heirs, now before us, we will not reduce the amount, remarking, however, that such fees should be graduated by the value of the services rendered for the benefit of the absent heirs, and that Courts cannot be too careful to avoid the reproach of making extravagant allowances to counsel, in the administration of estates. See 9 L. 284, *Stein v. Bowman*.

It is therefore ordered that the judgment appealed from be amended by reducing the curator's commissions from \$6,464 to \$1,210 50, and as thus amended it be affirmed. Costs of appeal to be paid by S. Brown, the appellee.

## No. 680.—M. GERNON v. W. W. HANDLIN.

Evidence is admissible to prove that an attorney is in the building in which the Court sits—it being the custom of the Court to send the crier to notify the attorney, if he is not in the court-room when the case is taken up.

In proceedings for sale of land for taxes, the act of 1858 does not authorize the appointment of a curator *ad hoc* to represent the unknown owner, where the owner had died and a curator to his estate had been appointed.

A party having purchased a lot of ground at tax sale, and afterwards ejected on account of irregularity in the proceedings, is entitled to recover the value of the improvements made by him.

**A** PPEAL from the Second District Court of New Orleans, *Whitaker, J. G. L. Bright*, for plaintiff and appellee. *W. W. Handlin*, for defendant and appellant.

**TALLAFERRO, J.** The plaintiff brings a petitory action against the defendant, to recover a certain lot of ground in the city of New Orleans. He avers that he acquired title to the property sued for, by virtue of a probate sale of the property of the succession of Henry A. Renneberg, deceased, made by the sheriff of the parish of Orleans, on the 16th day of February, 1860, at which sale he became the purchaser of the lot in controversy. He asks to be decreed the owner of the said lot; to be put in possession of it, and that he have judgment against defendant for rents, etc. The defendant opposes a prior title, derived from a tax sale, made on the 13th of December, 1859, under the provisions of statute No. 285, enacted by the Legislature in 1858, which statute provides for the sale of lands for taxes within the parish of Orleans. He prays to be adjudged owner of the lot of ground, or that he recover from plaintiff \$650, the value of improvements made by him on the premises, and to be reimbursed the amount he paid for taxes against the property. He pleads, also, the prescription of five years.

The plaintiff had judgment for the lot of ground, and the defendant appealed.

During the progress of this suit in the lower Court, the plaintiff's attorney being absent when the case was called, a judgment of nonsuit was rendered. Subsequently, on a rule taken by plaintiff, the cause was reinstated and a new trial granted. On the trial of the rule, plaintiff offered evidence to prove that, at the time the case was called, his attorney was engaged in the trial of a case in the Third District Court. The evidence was objected to, but the objection was overruled and the testimony admitted, to which the defendant reserved a bill of exceptions. The Judge below ruled that the presence of an attorney within the building in which the Court sits is an appearance, within the meaning of Article 536 of the Code of Practice. It further appears that it is the custom in that Court for a crier to be sent to notify the attorney, when he is not in the court-room at the time the cause is to be taken up. This, it seems, was done in the present case, but without effect, as the crier did not find the attorney, although he was in one of the court-rooms of the building at the time, and, consequently, he did not receive notice, as he had a right to expect, according to the established usage. We think the Court did not err in admitting the evidence.



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In the proceedings had for the sale of the lot of ground for taxes, a curator *ad hoc* was appointed to represent Renneberg. The act of 1858 requires, in such proceedings, that a curator *ad hoc* shall be appointed to represent the absent or unknown owner. This sale took place, as we have seen, in December, 1859. From the mortuary proceedings in regard to his estate, it appears that Renneberg died in 1856, and his name is given in the executory proceeding taken to have the lot of ground sold for arrearages of taxes. A curator to his estate had been appointed a few days before the tax sale took place. The provisions of the act of 1858 would not, in our view of the state of facts, authorize the appointment of a curator *ad hoc*. As the essential requisites of proper parties and notice are wanting, all the subsequent proceedings are without effect, and the defendant without a valid title.

The plea of prescription is not tenable.

The act of 1855, invoked in this case, applies to informalities in auction and judicial sales, and not to radical defects inherent in the proceedings.

We think the defendant entitled to the value of the improvements made by him on the lot of ground. These are shown to be worth five hundred and fifty dollars.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that plaintiff have judgment decreeing him to be the owner of the property described in his petition, and entitled, as against the defendant, to the possession of the same; and that he be put in possession of the lot of ground and premises in controversy, upon paying the defendant five hundred and fifty dollars, the value of the improvements made by him on the lot; that no writ of possession issue in this case until said sum shall have been paid or tendered, and that, if not paid or tendered within sixty days after the filing of this decree in the Court of the first instance, the defendant may issue execution for the same.

#### No. 1,007.—EDWARD KUNEMANN v. OLYMPE BOISSE and Husband.

The placing by a tenant of a partition across the hall of a building rented, so as to be readily removed without injury to the building, is a change that the lessee may make, as being of the nature of contract of lease.

The lessor has the right to restrict the use and enjoyment of his property in the hands of the lessee.

When the lessor subjects alterations in the article of lease to his written consent, he is presumed to have had in view those changes which the lessee may make without the consent of the owner.

**A** PPEAL from the Sixth District Court of New Orleans, Duplantier, J. Roselins & Philips, for plaintiff and appellee. Hunt & Denegre, for defendants and appellants.

LABAUVE, J. On the 17th May, 1865, the plaintiff leased to the defendant, Olympe Boisse, authorized by her husband, the property No. 156 on Canal street, with all the buildings, for a term of years, commencing on the 16th December, 1865, and ending on the 1st October, 1870, for the annual rent of 3,500, payable monthly.

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The contract of lease contains an express clause, that "the lessee shall make no alterations without the written consent of the lessor." This suit is now brought to rescind the contract of lease, on the ground that the defendant has made alterations in the premises, by erecting a petition in the hall of the ground floor, without plaintiff's consent and in violation of the contract of lease.

The defendant pleaded the general issue.

The District Court, after hearing the evidence, gave judgment for plaintiff.

The defendant took this appeal.

The substance of the testimony is as follows :

*A. Castaing.*—I examined the house and saw the alterations (change-ments) made in the hall, lower floor. The hall, between one of the sides and the stairs, was closed with boards. A large portion of the stairs was closed from the floor to the ceiling, so as to divide the hall into two departments. This partition is nailed to the floor and stairs. Before these alterations were made, it was a hall from the front door to the yard ; it now forms two small apartments. This alteration prevents the current of air in the lower portion of the hall. This partition has not affected the dampness of the yard, but does affect the humidity of the hall.

This partition is "une petite nuisance pour le corridor pour le plancher"—the floor is not so well ventilated as heretofore.

*Leon Oppermann.*—I have examined the corridor of that house several times, and found a change in that corridor, consisting of a partition (clesion) made of tongued and grooved planks, and with a door, which forms a division making two apartments. This partition begins at the foot of the staircase and runs up to the ceiling. This partition has been sharpened (taillé) so as to fit well into the cornice. This partition intercepts the current of air ; it makes it damper, and the floor will rot more rapidly. Before this partition was put there, it was a simple hall running from the street to the rear. With this partition there, the hall is formed into two small apartments—one used as a workshop of shoemaker. Before this partition was put there, there was a small venetian door at about three or four feet distant from the front door, which did not reach the ceiling, and did not intercept the circulation of the air.

There is a door to this passage way, which opens into the yard. If this door, leading into the yard, were kept constantly closed, it would not have the same effect of rotting the floor, as the partition; the air passes under the door.

*James Gallier.*—The partition is made of tongued and grooved ceiling, about seven-eighth or inch stuff ; it follows, I think, the line of the steps ; it is made fast to the string of the stairs by nails. I observed that boarding where it joins the cornice has been carefully scribed to it so as not to break the plaster. I suppose that partition could be removed in two hours. I do not esteem that that partition is an injury to that house. I think that air will pass as well under the door of the partition as under the other leading into the yard. But the floor of the house is so close to the ground, in consequence of the elevation of the banquette since the house was built, that I do not think that the want of circulation would cause the floor to rot any faster.

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I suppose that a ground floor which is damp on the bottom and on the top, will rot quicker than one which is damp on the bottom and dry on the top. If these inclosures do produce dampness above, then would the flooring rot at a quicker rate than if dry; but it must be first proved that the dampness has been caused by the partition: in this case the air will circulate under two doors as well as under one. This partition has the effect of shutting off a great quantity of air; it does on one side. That partition impedes the ventilation of the back part of the corridor. I think there are so many small outlets and cracks for air and ventilation, that complete stagnation of air under the stairs could not take place. The stagnation of air, with the partition there, is greater than it would be without the partition; the air has not the same circulation it would have were the partition removed. The effect of stagnation of air on flooring is to rot it, if the air is damp. Besides the door in the partition, there is a clear passage of air up the stairs into the yard. I should say that the ventilation, as it is now, is sufficient.

*B. M. Harrod.*—I saw the partition in the lower floor and examined it; its removal would be no injury to the building; it might be removed without any injury. I do not think that its presence there is any injury to the owner of the building or materially affects the process of rotting the floor. This partition has a tendency to impede the circulation of the air; it shuts off a part of the light. If the passage of air and light depended upon that partition, I think the partition would have a tendency to create dampness; but I think there is sufficient air and light to prevent rot, with that partition there. This partition affects the appearance of the staircase; it runs to the ceiling.

*W. Witsel.*—There is a good deal of circulation of air there, and I have not observed any dampness, and never had the partition door opened; there is sufficient current of air without it; as the stairway turns to the second floor, there is a large door which allows plenty of light and air.

*Jos. Rukhman.*—I am the agent of Madame Olympe during her absence. That partition was put up on the lower floor somewhere between the latter part of February and beginning of March. I remember the fact of its being put up, and seeing plaintiff going into the house before the workmen finished the partition; he made no objection to it at the time, that I know of. When I received a letter from plaintiff's attorney, that was the first time I heard of his objections to the partition. As far as my knowledge goes, that partition can be removed without any damage to the house or the stairs. The work has been put up very lightly. Plaintiff came there one morning, when we had the cistern repaired, and it was at the same time this work or partition was in progress.

*Auguste Carron.*—I know this partition on the lower floor. Plaintiff came there whilst it was being put up, and afterwards, and after it was put up; he never notified Madame Boisse to remove that partition.

*Geo. Chevallier.*—I made that partition; it makes no injury to the building; the only damage it would do to remove it, would be to buy a dime's worth of putty to close the nail holes along the staircase. I, alone, could remove it in an hour.

The above testimony satisfies us, that the partition and alteration complained of belong to that class of changes and modifications that a les-

see has the right to make, as being of the nature of the contract of lease, when there is no stipulation to the contrary; for we are of opinion that the exercise of that right may be restricted and modified, even entirely interdicted, in the lease. Duranton, vol. 17, Art. 97, says: "that nothing prevents the lessee from making these light changes in the interior distribution of the house, if this right has not been interdicted in the lease."

Troplong, du Louage, Art. 310, and Duvergier, Continuation de Toullier, vol. 18, Art. 398, are of the same opinion, and they both refer to Lepage, Lois des bâtiments 2de partie, page 186, who says:

"Il y a dans une maison qui m'est louée, une grande chambre qui me serait plus commode, si elle était divisée en deux par une cloison; quoique le bail me un donne pas le droit de faire cette nouvelle distribution, il suffit qu'il ne me le défende pas pour que j'y sois autorisé. Je pourrai donc former une cloison en planches ou en briques posées sur leur champ ou de toute autre manière, qui ne charge pas les planchers. Pareillement il existe dans une autre chambre une alcôve qui me gêne, et le bail n'en parle ni pour m'obliger à la laisser subsister, ni pour m'autoriser à la déplacer. Le propriétaire serait mal fondé à m'empêcher de me satisfaire, si je peux enlever l'alcôve et la replacer en quittant, sans l'endommager et sans dégrader l'appartement. \* \* \*

There can be no doubt that the parties to a contract of lease may stipulate that the lessee shall make no change or alteration belonging to the nature of this contract, or without the consent of the lessor, who has the right to restrict the use and enjoyment of his property in the hands of the lessee.

This stipulation would become the law of the parties. Civil Code, Arts. 11, 1895.

We now come to the legal effect of the clause in the lease: "The said lessee agrees to make no alterations, without the written consent of the lessor, who reserves to himself the right of annulling this lease in case the said lessee should fail to pay the rent stipulated, or otherwise violate her contract." On the trial of the case below, the defendant offered to prove by witnesses that, at the time the partition complained of was being erected, the plaintiff verbally consented to the same, and expressed his satisfaction with the manner in which the same was being made. But the Court refused to hear such proof, upon the ground that parol evidence was inadmissible under the written lease.

We are of opinion that the District Court decided correctly. The parties having stipulated that this consent should be expressed in writing, and no new agreement being alleged by defendant, virtually agreed that no other kind of proof should be received, otherwise the term "*written*" would have had no legal effect; and we must presume that the parties have used the expression for the purpose of restricting the evidence of consent to literal proof alone, as they had the right to do. Civil Code, Art. 1895.

The lessor, in subjecting the alterations to his *written* consent, is presumed to have had in view those changes and modifications belonging to the nature of the contract of lease, and which the lessee may make without the consent of the owner, and not those that the lessee is not authorized to make by law. Duvergier, Continuation de Toullier, vol. 18, Arts. 398,

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399. Troplong, du Louage, Arts. 310, 311. This clause is clear, and leaves no room for interpretation, and must apply to the partition and changes complained of, and such like, otherwise it would be nugatory. Civil Code, Art. 1946.

The defendant has failed to produce a written consent to authorize the alteration complained of, and parol evidence offered to that effect having been rejected, there is no proof that this change was authorized; but two witnesses having testified that the plaintiff was at the house several times while this partition was being put up, and made no objection to it, defendant's counsel contends that the plaintiff, by his silence and tacit approbation, gave his implied consent to the work, and he cannot now object to the same. We are of opinion that parol evidence having been offered to prove an express verbal assent, and rejected as inadmissible under the lease, we cannot now presume an implied consent. Were we to do so, we would contravene the text of Art. 2267 of the Civil Code, which refuses to the judge the discretion of presuming when parol evidence is not admissible; besides, the circumstance that the plaintiff was at the house several times while this partition was being put up, and made no objection to it, does not necessarily authorize the inference that he did not, at other times and elsewhere, make his objections to the defendant, who, nothing shows in the record, was present when the plaintiff went to the house; it is not, as commonly called, a negative pregnant with an affirmative, that he did give his consent. The presumption is not weighty, precise and consistent. C. C. Art. 2267. Presumptions are consequences which the law or the judge draws from a known fact to a fact unknown. C. C. Art. 2263. The fact known is that he was present at times when the defendant was not present; can we draw the consequence that he did not object at other times? We cannot.

Upon the whole, we are of opinion that the plaintiff has made out his case, and that our learned brother of the District Court has decided the contest correctly, and that his judgment must be affirmed.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, at the cost of the defendant and appellant.

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No. 520.—CLEMENCE JACQUINET v. SOPHIE BOUTRON.

When an obligor, from inevitable accident or irresistible force, cannot perform one of two things either of which at the time of his engagement he had the option to do, he is not relieved from the obligation to perform the other.

**A** PPEAL from the Fifth District Court of New Orleans, *Whitaker, J. L. Castera*, for plaintiff and appellant. *J. L. Tissot*, for defendant and appellee.

**TALIAFERRO, J.** Mademoiselle Sophie Boutron, the defendant, carrying on the millinery business in New Orleans, engaged at the city of Paris, in France, in October, 1860, for three years, the services in that line of business of the plaintiff, Miss Clemence Jacquinet. The services were to



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commence on the arrival of the parties at New Orleans. The employe was to receive a certain fixed salary, and her board and lodging. The defendant contracted to pay the plaintiff's traveling expenses from Paris to New Orleans; to be repaid, however, if plaintiff left defendant's service within the first year of the engagement. It was further stipulated that in the event the plaintiff should withdraw from the defendant's service, or the defendant should discharge the plaintiff before the expiration of the three years, the defendant should be bound to pay the plaintiff's traveling expenses on her return from New Orleans to Paris, on the condition that the plaintiff should not remain in New Orleans. It seems it was optional with defendant to furnish money for this purpose, or to secure and pay for a passage to France for plaintiff, on board a first-class sailing-vessel. Some dissatisfaction having arisen between the parties, the plaintiff, a short time after the termination of the first year's service, withdrew from the defendant's employ; and on the 31st of December, 1861, and also on the 6th of January, 1862, she wrote to the defendant, requiring her in accordance with their contract to furnish her money to return home. This was refused, and on the 4th of February following, this suit was instituted in which plaintiff demands two hundred and fifty dollars as traveling expenses, necessary to enable her to return to Paris, with interest thereon from judicial demand, and forty dollars per month as damages for the time she would be compelled to remain in New Orleans by the refusal of defendant to pay her. The answer avers that the defendant was only bound by the contract sued upon, to pay plaintiff's passage to France on a sailing-vessel, if any such passage had been engaged by plaintiff, which defendant avers was never done. She prays that the suit be dismissed at plaintiff's cost. Judgment was first rendered on the 11th of February, 1863, in favor of plaintiff for two hundred and fifty dollars, and costs of suit. The defendant obtained a new trial, which resulted, on the 21st of April succeeding, in a judgment in favor of the plaintiff, decreeing defendant "to pay the plaintiff two hundred and thirty dollars, with judicial interest from the 1st of June, 1862, or secure for plaintiff a passage from New Orleans to Havre and Paris, either by the direct route, in a sailing-vessel of the first class, or by way of New York, on or before the first of May proximo, at the charge and cost of the said defendant; and it is further ordered, adjudged and decreed, that the said plaintiff have judgment against the said defendant, in the sum of forty dollars per month from 1st of June, 1862, to date of this judgment, as damages—say four hundred and seventeen dollars and thirty-three cents, and costs of suit."

From this judgment defendant has appealed.

The defendant complains of the judgment, because it was determined by events that transpired after the "*contestatio litis*," instead of being decided exclusively upon the state of facts that existed in February, 1862, when the parties joined issue. At that time, it is contended that it was impossible for defendant to comply with her part of the contract. It was shown on her part, that at that time the port of New Orleans was blockaded by a squadron of United States vessels of war, and that the port was opened on the 1st of June, 1862, facts which are matters of history. It is contended that the blockade of the port constituted the

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*vis major* or irresistible force, which dispensed the defendant from the obligation to secure for the plaintiff a passage to France; and, further, that it also deprived the plaintiff of the power to fulfill her engagement to defendant, not to remain in New Orleans after the annulment by either party of their contract. It is held, therefore, that this suit was premature, and should be dismissed.

The judgment of the Court *a quo*, was predicated upon the reason that defendant having been put *in mora* by the demand made before the institution of the suit, and the *vis major* alleged, being removed by the opening of the port on the 1st of June, 1862, sometime before the decision of the suit, she could no longer refuse to comply with the contract.

A bill of exceptions was taken on the part of defendant, to the introduction of evidence to show the amount necessary to defray the traveling expenses of plaintiff from New Orleans to Paris by way of New York, as defendant by her contract, was under no obligation to pay plaintiff's passage across the sea, except on board a sailing-vessel direct from New Orleans. We think the testimony was properly admitted. No route is expressed in the contract. It is simply that the traveling expenses shall be paid by defendant, or a passage secured at her cost, on board a first-class sailing-vessel.

There might be force in the objections urged against the judgment, if the facts justified the inferences which seem to have been drawn from them on the part of the defendant. But we see no evidence in the record showing that the impediment of the blockade, formed in this case the "irresistible force," contemplated by law to exonerate a party from complying with a contract. The defendant had the option to pay the money necessary to discharge the traveling expenses of the plaintiff from New Orleans to Paris, or to secure for her (free of cost to plaintiff) a passage to Havre on board a first-class sailing-vessel. She might have paid the money, if she could not, on account of the blockade, have engaged a passage on board a vessel going to France. The latter being impossible, did not release her from doing the former—the very thing required by the plaintiff. Where an obligor, from inevitable accident or irresistible force, cannot perform one of two things, either of which he had at the time of his engagement the option to do, he is not relieved from the obligation to perform the other. Neither, on the other hand, do we see the *vis major* which deprived the plaintiff of the power to perform the condition upon which she had the right to demand her traveling expenses, viz: that of returning from New Orleans to Paris. If, at the time of the institution of this suit, and for a month or two afterwards, it were impossible for the plaintiff to sail for France from New Orleans, it by no means follows that she could not have gone by land to New York, or some other port not blockaded, and from thence set sail for her native land. Being, what the record authorizes to suppose, a subject of France, no serious difficulty would have been encountered by her in passing through the two sections of this country, then warring against each other, France being a neutral power. The mere dictum of counsel in their brief, that it was impossible for the plaintiff to comply with her obligation to return to Paris, in the absence of any evidence establishing that

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fact, must be taken with some grains of allowance. We do not think the evidence justifies the claim set up for damages.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. And it is further ordered, adjudged and decreed, that the plaintiff recover from the defendant the sum of two hundred and thirty dollars, with judicial interest thereon from judicial demand, with all costs incurred in the Court below, the plaintiff and appellee paying costs of this appeal.

No. 1200.—WM. McCracken v. B. B. Simms.

Where the return shows that defendant was cited by service "on Miss B. B. Simms, a white person, about the age of fourteen, residing in defendant's house: *Id.*—Not to be a legal citation.

**A**PPEAL from the District Court, Parish of Pointe Coupee, *Cooley, J. Smith & Halsey*, for plaintiff and appellee. *Edward Phillips*, for defendant and appellant.

HYMAN, C. J. In this case the plaintiff took a judgment by default against the defendant.

The defendant did not appear nor file an answer, and the plaintiff obtained a final judgment against him.

The defendant has appealed, and urges in this Court a renewal of the judgment, because he was not legally cited.

The sheriff's return shows that he received, on the 12th of June, 1866, copies of the citation and petition, and served them on 24th July, 1866, on Miss B. B. Simms, a white person, about the age of fourteen, residing in defendant's house.

The service of citation and petition, as shown by the return, is defective in several respects.

It is only necessary to notice one of the defects.

The return does not show that the service of copies of citation and petition, was made at the usual place of domicile or residence of the defendant. See Code Practice, 189; 12 La. 550; 14 La. 212; 5 An. 147 and 217.

The defendant was not legally cited.

The plaintiff contends that, as the note of evidences shows that the signature of the note sued on was admitted, we are to conclude that the defendant made appearance, either in person or by attorney.

By whom this admission was made, the note of evidence does not inform us, and we cannot draw a conclusion from the admission that contradicts the record.

It is ordered, adjudged and decreed that the judgment of the lower Court be annulled, avoided and reversed.

And it is further decreed, that the case be remanded to the lower Court to be proceeded in according to law.

No. 413.—W. W. EASTERLING *v.* JAMES P. THOMPSON.

An *ex parte* order of seizure and sale of mortgaged property, under a title importing a confession of judgment, must not contain any other or superior right over the property than that given by the mortgage. The law will not allow the mortgagor to incorporate a privilege on the property mortgaged, in the decree rendering the mortgage executory. The order must follow strictly the specifications in the act of mortgage.

**A**PPEAL from the District Court, Parish of Carroll, *Farrar, J.* Sparrow & Montgomery, for plaintiff and appellee. W. G. Wyly, for defendant and appellant.

HYMAN, C. J. The appellee has placed on file in this Court the transcript of appeal. He has also filed an answer praying for damages, as in case of a frivolous appeal.

The answer compels an examination of the record, in order to ascertain whether the defendant had any probable grounds for his appeal. Indeed, the practice of the Court is to examine the record, in cases which are brought up by the appellee, in the same manner as if the transcript had been filed by the appellant, and to render judgment in accordance with right upon the merits of the appeal.

On looking into the record, we find that the plaintiff obtained an order of seizure and sale upon a simple authentic act of mortgage. The instrument does not accord to him any privilege upon the property hypothecated.

Yet, the petition for an order of seizure and sale prays "for a privilege and priority of payment on the proceeds of said sale" of the property hypothecated, and the decree recognizes such priority and privilege, for the sum claimed, and awards "a writ of sale" accordingly.

The distinction between a mortgage and a privilege is clearly defined by the Code. A mortgage is a right granted to the creditor over the property of his debtor, for the security of his debt, and gives him the power of having the property seized and sold in default of payment. C. C. 3245. A privilege is a right which the nature of the debt gives to a creditor, and which entitles him to be preferred before the other creditors, even those who have mortgages. C. C. 3153. "And privileges can be claimed only for those debts to which it is expressly granted by the Code." C. C. 3152. See also *Harned v. Churchman*, 4 An. 313; *Bachus v. Moreau*, ib. 314; *Citizens' Bank v. Cary*, 12 R. 279; *Cleveland v. Sproul*, 12 Rob. 172, and *Boner v. Mahle*, 3 An. 603.

As the creditor in this case only holds a mortgage against his debtor, the decree which grants him the superior security of a privilege is erroneous. The party who obtains the *ex parte* order of seizure and sale must take care that he does not exact more than is just, or a different thing from that which he is entitled to.

It will not do for the creditor to say that the *ex parte* order cannot prejudice the rights of third persons, and that it must be a matter of indifference to the debtor, whether his property is sold under an act importing a mortgage or one importing a privilege, since the same property is to be sold in both instances.

Easterling v. Thompson.

The reply is, the right which the creditor seeks to enforce grows out of a contract in an authentic form. The creditor cannot take any more, or any other thing, than that which is granted by the act; and, if the Court were to award him a different thing, it would make a new contract for the debtor. Moreover, there may be cases where good faith would require the mortgagor to do nothing to impair the vendor's privilege, or the privilege of the builder or material man.

It is therefore ordered, adjudged and decreed by the Court, that the judgment of the lower Court be avoided and reversed; and now proceeding to pronounce such judgment as ought to have been pronounced, it is ordered, adjudged and decreed, that an order of seizure and sale issue in favor of the plaintiff, directed to the sheriff of the parish of Carroll, commanding him to seize the following described tract of land, of the defendant, situated in said parish, viz: the north half of section No. 11, in township No. 19, range No. 11 east, containing three hundred and twenty-three and 50-100 acres, and sell the same in conformity to the law regulating seizures and sale, to pay the plaintiff the sum of seven hundred and forty dollars, with interest thereon, at the rate of eight per cent. from the 4th day of January, A. D. 1861 until paid, said debt and interest being secured to the plaintiff by the conventional mortgage executed by the defendant, and bearing date the 30th day of October, A. D. 1860; and it is further ordered that the costs of the proceedings, in the order of seizure and sale in the lower Court, be paid by the defendant, and that the costs of the appeal be paid by the plaintiff and appellee.

NO. 79.—CHARLES GALLAGHER v. PHEBE TYSON AND JOHN J. TYSON.

Notice of protest, enclosed in a letter addressed to the endorser, sent by mail to a post-office in the parish of his residence, is a good notice, in the absence of any proof that there was another post-office nearer to his residence.

**A**PPEAL from the Tenth District Court, Parish of Tensas, *Farrar, J. Buchanan & Gilmore*, for plaintiff and appellee. *T. P. Farrar*, for defendants and appellants.

**LSLEY, J.** This is an appeal from a judgment of the District Court of Tensas, against John J. Tyson, one of the defendants, as the endorser of four several promissory notes, all drawn in Tensas parish, and duly protested at their respective maturities, in 1859, at New Orleans, were they were made payable. Notices of protest in due legal form were duly served on the endorser, by letters addressed to him by the notary at Kirk's Ferry, a post office in the parish of Tensas, and put in the post-office at New Orleans.

It has been repeatedly held by this Court that a notice to an endorser, sent by mail to a post-office in the parish of his residence, is a good notice in the absence of any proof, that there was another post-office nearer to the endorser. *Medley v. Norris*, 2 A. 141; *Yeatman v. Erwin*, 5 La. 266, and *Knox v. Buhler*, 7 A. 42.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellants.



## 513.—CYRUS W. FIELD &amp; CO. v. NEW ORLEANS DELTA NEWSPAPER COMPANY.

An absentee having property in the State, or within the jurisdiction of the Court, liable to seizure by his creditors, may be brought into Court by a curator *ad hoc*, without attaching his property. The process of attachment is one mode by which the creditor may pursue his debtor, in the cases specified by law, but is not exclusive. In cases where the absent debtor leaves his property without an administrator or agent, the creditor may cause him to be cited through a curator *ad hoc*, and a judgment rendered contradictorily with the curator *ad hoc*, in such cases, is binding on the absent debtor.

**A**PPEAL from the Second District Court of New Orleans, *Whitaker, J. Martin Blache*, for defendants and appellees.

W. W. Handlin's brief, for plaintiffs and appellants, on rehearing.—It is necessary, on the trial of this exception, to assume certain principles, which must be granted, in order to arrive at the true issue raised by the pleadings. The defendants must be considered as absentees. "Absentee is the person who has resided in the State, and has departed without leaving any one to represent him. It means also the person who never was domiciled in the State, and resides abroad." It must be granted also, that all the facts set forth in the petition, and not denied by the exception, are to be taken as true, on the trial of the exception. "On the trial of such an exception, which is in the nature of a demurrer, all averments of the petition are taken as true." 2 New Hen. Dig., 1169 *et seq.*

The only two points, then, raised by the exception, are: 1. That there was no property attached; and, 2. That there was no personal citation, or citation at the domicile; and he relies on the case of *Dupuy v. Hunt*. Without reviewing all the decisions, at present, I refer to my original brief, and will only remark, that in the case of *Tutor v. Thayer*, 6 A. 27, to cancel a mortgage there was neither citation on the defendants nor attachment.

But leaving aside the correctness of the decisions of the Supreme Court (for which I have great reverence) on this subject, I shall content myself with the authority of the Code of Practice.

Article 116 provides, that "if the person intended to be sued be absent, and not represented in the State, the plaintiff must demand that a curator *ad hoc* be named to defend the suit," not the attachment. "If the minors, the interdicted, or absent persons, against whom the suit is brought, had no tutor or curator, and the plaintiff has had a special curator appointed to defend them in the suit, the service must be made on that curator." 195.

"The above provisions shall not be so construed as to prevent persons having claims against a minor, or person absent, from pursuing the same, previous to a curator or tutor having been appointed, as above prescribed; but, in such cases, the person claiming must in his petition, pray the Court to which it is addressed to appoint a tutor or curator *ad hoc* to defend the minor or absent person in the action." 964.

In remedies, the *lex fori* must govern. Story's Con. § 556. Kent says: "But on this subject of conflicting laws, it may be generally observed that there is a stubborn principle of jurisprudence, that will often inter-

vene and act with controlling efficacy. This principle is, that when the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land. *In tali conflictu magis est, ut jus nostrum, quam jus alienum servemus.* Kent Com. 39, p. 461, 3d ed.

*Reporter.*—The judgment in this case was rendered on a rehearing, an opinion having been had on the first hearing, affirming the judgment of the Court below. The final judgment was rendered by HOWELL, J.

HOWELL, J. Plaintiffs allege that the New Orleans Delta Company, composed of H. J. Leovy, D. Daponte and P. E. Bonford, of New Orleans, is indebted to them in the amount of three promissory notes, signed by said Leovy, as the Business Manager, drawn to his own order, and endorsed by him and the other two members, and duly protested; that the said defendants are absentees; that they have no known agents in the State; that no curator has been appointed for the administration of their property, and that they have property in New Orleans, out of which their claim can be satisfied. They pray that a curator *ad hoc* be appointed to defend said absentees in this suit, and for judgment against them *in solido*.

Martin Blache, Esq., appointed curator *ad hoc*, excepted to the jurisdiction of the Court, on the ground that no property of the defendants had been attached, and no personal service made. This exception was maintained in the lower Court, and on appeal the judgment was affirmed by this Court. A rehearing was granted, and plaintiffs' counsel strenuously contends that, under the express provisions of our law, an absentee, having property in the jurisdiction, may be brought into Court by a curator *ad hoc* without attaching his property, and in support of this position he relies on Article 57 C. C., and Articles 116, 195 and 964, C. P.

Article 57, C. C., in the chapter treating of the curatorship of absentees, provides that, "if a suit be instituted against an absentee, who has no known agent in the State, or for the administration of whose property no curator has been appointed, the Judge before whom the suit is pending, shall appoint a curator *ad hoc* to defend the absentee in the suit."

Article 116, C. P., in the chapter treating of the persons "against whom actions may be brought," declares that, "if the minor, whether under or above the age of puberty, against whom one intends to institute a suit, has no tutor nor curator *ad litem*, the plaintiff must demand that a curator *ad hoc* be named to defend the suit. *The same course must be pursued, if the person intended to be sued be absent, and not represented in the State.*"

Article 195, in the section treating "of petition and citation," provides that, "if the minors, the interdicted, or absent persons against whom the suit is brought, had no tutor or curator, and the plaintiff has had a *special curator* appointed to defend them in this suit, the service must be made on that curator in person, or at his domicile."

Article 964, in the section treating "of the appointment of tutors and curators of minors, interdicted and absent persons," declares that "the above provisions" (prescribing the rules for the appointment by the

Probate Court of such tutors and curators) "shall not be so construed as to prevent persons having claims against a minor, or a person absent, from pursuing the same previous to a curator or tutor having been appointed as above prescribed; but in such cases, the person claiming must, in his petition, pray the Court to which it is addressed, to appoint a tutor or curator *ad hoc* to defend the minor or absent person in the action."

Those articles are plain, and, as said in the case of *Dupuy v. Hunt*, 2 A. 562, they "presuppose that the absentee has property in the State, which, of itself, would give a court jurisdiction," and, in our opinion, provide the mode in which a creditor may enforce his right in a case where an administration by a tutor or curator has not been ordered, as provided for in the codes, on the principle that the omission to have the property or estate administered in due form, shall not prevent a creditor from making the property liable for his claim.

We understand that all these articles must be taken together, and construed with reference to the subject-matter treated of in those portions of the codes in which they are found, and that they provide that where there may be a curatorship or tutorship, but none has been obtained or demanded by any one entitled to it, a creditor may have a tutor or curator *ad hoc* appointed to represent his debtor in the particular suit, which is in effect a special tutorship or curatorship *pro hoc vice*.

The process of attachment is one mode by which a creditor may pursue in the cases specified by the law, but is not exclusive. There may be cases of absent debtors, where the creditor may not be able to take the oath or give the bond, and yet have a remedy, as provided in these articles, by which he can have his debtor served in the person of a substitute or representative in law. In the case of *Dupuy v. Hunt*, cited above, this Court recognized three contingencies, in which a curator *ad hoc* may be appointed: "If the absentee leaves his property without an administrator or agent, if it be attached at the suit of a creditor, or if the absentee becomes a necessary party to a suit between other persons lawfully in Court, in the furtherance of justice the law authorizes a curator *ad hoc* to represent him. There is then, something on which the jurisdiction of the Court is based, and the judgment rendered would be within the recognized and ordinary prerogatives of the judicial power." This case may be classed in the first category.

Under this view of the law, and the allegation in plaintiffs' petition, that the debtors, who are absent and not represented, have property in the jurisdiction of the Court, we think a proper case is presented for the appointment of a curator *ad hoc*, and that service upon him is sufficient.

No question is raised as to whether there should be a curator to each absentee, the allegation being that the three composed a newspaper company, and the notes sued on and endorsed by them were given for paper furnished to them. It should also be remarked that the suit was brought in the Court vested with probate jurisdiction.

We think our conclusion conflicts in no manner with the doctrine established or enunciated with others, in the case of *Dupuy v. Hunt*, upon which the curator *ad hoc* relies for sustaining his exception.

In that case *Hunt*, the defendant, was a resident of Mississippi, and

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the property in reference to which the controversy arose, was alleged to be in *his possession*. There was nothing upon which the jurisdiction of the Court could be based. Here the allegations of the petition (which for the purposes of the exception are taken as true) show that there is property, which plaintiffs, through a curator *ad hoc*, can subject to their claim. In that case the point decided was, that a Court in Louisiana could not render a judgment against a resident of another State or country, who was never in the State, had no property in it, and was entirely unconnected with a pending or possible litigation, by the appointment of a curator *ad hoc* to represent him, in which decision we concur. Nor can the decisions in the other cases quoted be considered antagonistic with the ruling here recognized.

We think the provisions of law under our consideration are plain and positive, and that the doctrine, sometimes broadly stated, that a party can be brought into Court only by his property, or by legal service of citation, must be understood as subject, in certain circumstances, to their operation, and that in the contingency provided for by them an attachment of the property is not essential. The law does not say that creditors in such cases, shall resort to the attachment process, and have property attached in order to prosecute their claims.

It is therefore ordered that the decree heretofore rendered by us be set aside, and it is now ordered that the judgment appealed from be reversed, that the exception be overruled, and the case remanded to be proceeded in according to law. The defendants and appellees to pay the costs of appeal.

## No. 1170.—JOHN BRONSON, JR., et al. v. BALCH, WARDEN et al.

The appeal will not be dismissed on the ground that the appeal bond was given in favor of the wife, the surviving partner in community, as tutrix to her minor children, and not in her own right. The tutrix is *ex officio* administratrix of the estate, and the judgment appealed from is the property of the estate; so is the appeal bond.

The administration of the succession involves with it the administration of the community, and the administrator may rightfully cause the community property to be sold to pay the debts of the succession.

**A** PPEAL from the Fifth District Court, Parish of Iberville, *Posey, J.*  
A. Talbot and F. S. Goode, for plaintiffs and appellants. Barrow & Pope, for defendants and appellees.

LABAUVE, J. The petitioners represent that they are the legitimate and only children of John Bronson, and being residents of the State of Louisiana, and loyal citizens of the Confederate States of America, and are entitled to the property of the said John Bronson, who resides in the State of New York, and against whom proceedings of confiscation have been instituted, and in which, under act of Congress of Confederate States, petitioners have intervened; that petitioners are the owners of a certain tract of land situate in the parish of Iberville; that the defendants have obtained an order of seizure and sale against

said tract of land; and that the proceedings are invalid, null and void, on various grounds, which they enumerate in detail.

They prayed for and obtained an injunction arresting the sale.

The defendants appearing, peremptorily excepted to the petition, on the ground that said parties had no interest in the subject-matter of the said suit, they being in no way the owners of said land, but the same belonging in truth to said John Bronson.

They prayed that the injunction may be dissolved, with damages on the bond of injunction.

The Court dissolved the injunction and allowed damages.

The plaintiffs applied and prayed for a devolutive appeal by petition, in which they alleged that Timothy Young, one of the defendants, has died since the rendition of the judgment, leaving a surviving widow in community, Ann Young, and two minor children, Julia and Thos. Young, and to whom their mother has qualified as natural tutrix, and who should be made parties to the appeal.

They prayed for a devolutive appeal, and that Ann Young, in her own right, as partner in the community with her deceased husband, and as tutrix of her minor children, be made parties to said appeal.

Mrs. Ann Young was duly cited, and served in her own right and as tutrix.

The plaintiffs and appellants executed a bond, with a surety, for one hundred dollars, in favor of Samuel Warden, Joseph H. Balch and Ann Young, tutrix, and Michael Credon, executors, administrators and assigns.

The objection is, as it is perceived, that the bond is not given in favor of Ann Young, in her own right, and that, therefore, she is not a party to the appeal.

The defendants and appellees rely on the authority in the case of *Clark v. Hébert*, 14 An. 183, where this Court said :

"This suit has been brought against the defendant in her capacity of widow in community and tutrix to the minor children of *Vincent Kirkland*, deceased ; and the defendant, in her capacity of tutrix, has set up a reconventional demand. The appeal bond is executed by the plaintiffs in her favor, in her individual capacity only. The appeal is defective in not making the defendant a party in her capacity of tutrix."

In that case, the Court properly dismissed the appeal ; the defendant had become a plaintiff as tutrix in her reconventional demand, and she was essentially a party as appellee, and no bond was given in her favor. In the present case it is the reverse ; the bond is executed in favor of the tutrix, who, as *ex officio* administratrix, represents the estate which is presumed to be accepted under the benefit of an inventory, the heirs being minors. 2 A. 462. 10 A. 534. 5 A. 180. 7 A. 134. 12 A. 457. The judgment appealed from belongs to the estate, so does the bond ; the proceeds of the judgment, or of the bond, would inure to the benefit of the community, but they must pass through the succession before they reach the widow in community ; until a liquidation and settlement, and payment of the debts of the succession, the community is but a name, a hope. After the death of the husband, the community debts are generally set up against his succession. 17 L. 238. At the dissolution of the marriage, the wife or her representatives can claim nothing until debts be



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paid, and cannot sue for half the price of any specific property acquired during marriage, when a liquidation of the community does not show any gains to be divided. 1 R. 378. 2 A. 30.

The administration of the succession of the deceased husband involves with it the administration of the community, and the executor or administrator may rightfully cause the community property to be sold to pay the debts of the succession. 12 A. 222.

We are of opinion that the bond is sufficient, and covers the interest of all parties, including the widow in community. 1 R. 258.

The motion to dismiss is overruled.

On the merits, we are of the opinion the District Court did not err in dissolving the injunction; the petition represents that the land seized was the property of John Bronson, plaintiff's father, residing in the State of New York, and that plaintiffs, being residents of Louisiana, were entitled to the property of said John Bronson. This allegation shows that the plaintiffs were not the owners.

But we have looked in vain in the record to find evidence of the amount of the judgment, to serve as a basis for the damages and interest allowed by the Judge on the dissolution of the injunction; it was the duty of the defendant to introduce in evidence the judgment enjoined, or other legal proof to fix the damages and interest.

We are bound to reverse the judgment, and render such decision as is authorized by the record.

It is therefore ordered and decreed, that the judgment of the District Court be annulled and reversed, and it is further ordered and decreed that the injunction be dissolved, and that the plaintiffs and appellants pay costs below, and the defendants and appellees those of this appeal.

No. 1226.—RICHARD MASON, Administrator, *v.* THE EXECUTORS OF HALLER NUTT.

When an appeal is taken from an interlocutory order, in an appealable case, and the parties are before the Supreme Court, it is not incumbent upon them to dismiss the appeal *ex officio*, even though it is not shown that an irreparable injury will be done.

An administrator has not authority beyond the limits of the State that appointed him.

He must be confirmed in his administration by the Courts of the State, in which property is situated, or debts are owing, before he can administer the property or sue therein for the debts.

**A** PPEAL from the District Court of the Parish of Tensas, *Farrar, J. Mayo & Spencer*, for plaintiff and appellee. *Aroni & Collier*, for defendants and appellants.

HYMAN, C. J. In the transcript in the above named suit, we find two orders of appeal.

One is from an order of the clerk of the District Court, ordering the registry, recording and execution, of the will of Caroline M. Williams, deceased.

There is no certificate that the transcript contains the evidence adduced on the trial of the application for the order of registry and execution of

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the will. There is no statement of facts nor bill of exceptions. There has not been filed in this Court, within the delay allowed by law, an assignment of error of law as appearing on the face of the record.

The appeal, therefore, from the order of the clerk, ordering the registry and execution of the will, must be dismissed. See Code of Practice, Articles 896 and 897.

The other order of appeal is from a decree of the Court overruling defendants' exception, wherein they deny the right of plaintiff to sue them for debts alleged to be owing by them to the estate of Caroline M. Williams, deceased.

The plaintiff sued the defendant as the administrator of the estate, by the appointment of the Probate Court of Adams county, State of Mississippi, and defendants, in their exception, averred that he had not been recognized administrator of the succession by authority of this State, that the succession had not been opened herein, and that plaintiff had no authority to sue them, and prayed that the suit might be dismissed.

The amount claimed in this case, gives us jurisdiction as appellate Court from a decree of the lower Court, but the decree from which the appeal is taken is interlocutory, and it is not shown that the same may cause an irreparable injury to the defendants, the appellants, and had the plaintiff, the appellee, moved to dismiss the appeal from this decree, we would have dismissed it.

We do not think that it is incumbent on us to dismiss the appeal without a motion for that purpose, as we really have appellate jurisdiction of the case, and the parties are before us.

The exception of the defendants was well taken, and the suit should have been dismissed.

The plaintiff was appointed in the State of Mississippi, and, by its authority, administrator of the estate of Caroline M. Williams, deceased; but he has not obtained a confirmation of his appointment in our courts, and, before so doing, he has not the right to sue the defendants in this State, for debts owing by them to the estate.

An administrator of an estate has not authority beyond the limits of the State that appoints him.

He can neither administer the property of the estate situated in another State, nor collect debts therein owing to the estate. 8 La. 508. 17 An. 15.

He must be confirmed in his administration by the courts of the State in which the property is situated or the debts are owing, before he can administer the property or sue therein for the debts.

Plaintiff has referred us to several decisions of this Court, wherein this Court has sustained suits of administrators appointed by authority of other States, without their appointments having been confirmed by authority of this State, for the recovery of the possession of property brought to this State from the States that appointed them, and he relies on those decisions to sustain this suit.

The decisions are only confirmatory of the doctrine announced in 2 N. S. p. 20, "that he who is answerable to another for a thing placed in his possession, has such a special property in it as to enable him to maintain an action for its possession, if taken by a stranger."

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The plaintiff is not suing the defendants to recover from them the possession of property belonging to the estate of Caroline M. Williams, and which was under his charge by virtue of his appointment of administrator by authority of the State of Mississippi, and of which he has been dispossessed by defendants, or any other person; but he is seeking to recover of defendants a sum of money by process in our courts, on evidence of indebtedness, of which he has the possession and control.

It is decreed that the appeal from the order of the clerk, ordering the registry, recording and execution, of the will of Caroline M. Williams, deceased, be dismissed, at the costs of the appellants.

It is further decreed, that the judgment of the District Judge, overruling the defendants' exception, be avoided and reversed, that the exception be sustained, and that the suit brought by plaintiff against defendants, styled *Richard Mason, Adm'r, v. Executors of Haller Nutt*, be dismissed, plaintiff to pay all the costs of said suit.

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No. 1185.—CITIZENS BANK v. WM. W. PUGH.

Where the mail service, between two points, is suspended or broken up, a notice of protest, deposited in the post-office by the notary at one place, addressed to an endorser, who resides in another, is not good; the post-office affords a safe means of conveyance, but not a legal place of deposit for notices.

Notice of protest, addressed to the endorser, sent by mail, must be addressed to the nearest post-office to his residence, unless it is shown that he is in the habit of receiving his letters and newspapers from one more distant.

The acts of the Legislature of 1827 and 1855, do not change the general commercial law, in regard to the diligence to be used in serving notices of protest; these acts merely provide a new mode of proving such diligence.

Where the mail service cannot be used as a means of conveying notice, the holder of commercial paper is not excused if he does not use all other practicable means of bringing home notice to the party whom he wishes to charge.

**A** PPEAL from Fourth District Court, Parish of Assumption, *Beauvais, J. Hyams & Jonas, Bush & Goode, and Miles Taylor*, for plaintiff and appellant. *Nicholls & LeBlanc*, for defendant and appellee.

**LISLEY, J.** The defendant, who is sued as the endorser of a promissory note made payable at the Citizens' Bank, New Orleans, which was protested for non-payment at its maturity, on the 20th December, 1862, resists the payment of it for the want of notice of protest.

He contends, 1: "That the notice was not sent to him at the post-office, where he was in the habit of receiving his letters, etc., nor to the one nearest to his residence.

2. That the mails at the time of the protest had been interrupted, and that it was the duty of the holder to send the notice by some other means.

The following facts were proved on the trial of the case: That the notary, who made the protest on the day of its date, deposited in the post-office at New Orleans, a notice of protest, etc., and addressed to the endorser at Napoleonville, Louisiana;

That, at the time when the notice was put in the post-office, all mail communication between New Orleans and the parish of Assumption,

wherein the defendant then resided, was broken up in consequence of the war;

That the Albemarle post-office was the one nearest to the defendant's residence, and that that was his post-office, and that he was not in the habit of receiving his letters, newspapers, etc., at the post-office at Napoleonville.

Under ordinary circumstances, the existence of such a state of facts would, by the commercial law, as it is interpreted by our Courts, discharge an endorser, and we have now to determine whether in view of the political state of the country, when the protest was made, he is, for the causes assigned, equally exonerated.

It is a rule of the commercial law, that want of protest, etc., is excused by proof that these requirements were prevented by inevitable casualty or superior force; and, also, that if the political state of the country renders it impossible for the holder of negotiable instruments to act, they will not be required. Chitty on Bills, 360 and 480. Edwards on Bills and Promissory Notes, 458, 392 and 492. Story on Bills, sec. 286. The doctrine rests upon the maxim, *impossibilium nulla obligatio est*.

We must, therefore, ascertain whether the holder of the note sued on, having at his command some practicable and ready means of giving to the endorser notice of the protest, at the earliest moment after the protest, should not have resorted to it, to hold him liable. The writers on mercantile law inform us that there are three modes of serving notices of protest: 1st, by mail, 2d, by ordinary conveyance, and 3d, by special messenger. The usual mode is by mail; but when, as in the present case, it was publicly known, that the whole mail service above New Orleans was broken up, it was a vain thing to put the notice into the post-office. This Court, in *Laperte v. Landry*, 5 N. S., lays down a sensible rule. It holds that where notice may be conveyed by mail, it suffices to put it in time, properly directed, in the post-office; but where the notice cannot be conveyed by mail, it is idle to put it into the post-office; for the post-office affords a safe means of conveyance, but not a legal place of deposit for notices. See also *Union Bank v. Campbell*, 2 An. 759. When the law requires steps of diligence to convert conditional into absolute obligations, it will not permit, as a substitute for such steps, vain and idle ceremonies. The law merchant, which recognizes the mail as a legal means of serving notices, supposes it to be a practicable one; and it requires, if there is no mail, that the notice be sent by the earliest conveyance. Chitty on Bills, 516, 522, 504, 506, 518, and Edwards on Bills, pages 572 and 573.

Was it impossible, or even impracticable, to serve a notice of protest on the defendant at or within a reasonable time after the protest, in any other way than by depositing it in the post-office?

All that district of country, in which lies the parish of Assumption, was occupied and controlled by the United States forces from October, 1862, until June, 1863, when it was occupied temporarily by the Confederate army. At the time when the protest was made, commercial intercourse between the inhabitants of New Orleans and those of the parish of Assumption, was not unlawful; for, on the 16th of August, 1861, by a proclamation of the President of the United States (issued in pursuance

of the fifth section of an act of Congress, approved 13th July, 1861), it was declared, "that the inhabitants of the State of Louisiana, and other States mentioned (except the inhabitants of that part of the State of Virginia, lying west of the Alleghany mountains, and of such other parts of that State, and the other States as may maintain a loyal adhesion to the Union and the Constitution, or may be from time to time, occupied and controlled by forces of the United States, engaged in the dispersion of said insurgents) are in a state of insurrection, and that all commercial intercourse between the same and the inhabitants thereof, with the exception aforesaid, and the citizens of other States, and other parts of the United States, will remain unlawful until such insurrection shall cease or has been suppressed."

There was, therefore, no legal impediment at that time, nor could it have been contrary to public order, to serve a notice of protest on an endorser, residing in the parish of Assumption. Nor in point of fact, was it then impossible, or even impracticable to serve a notice on such endorser, either by ordinary conveyance or by a special messenger, for there was then free communication for loyal citizens of the United States, between the city and the residence of the defendant, and there was no lack of public conveyances plying between these two points, and passing directly before the defendant's house, by means of which any notice addressed to him would unquestionably have reached him.

But the plaintiff invokes the maxim *impossibilium nulla obligatio est*, and says, that he was not obliged, under the circumstances, to give notice at all, and he refers us to authorities which recognize the maxim; but all these authors suppose a physical or moral impossibility as an excuse for omitting to give notice of protest to a party, and we have seen that there was neither the one nor the other in the present case.

He further contends that, the Legislature having prescribed the manner of giving notice of protest, the holder is not compelled to adopt any other, and he refers us to the act of 9th March, 1855.

The provisions of this act, in relation to the mode of serving protests by a notary, and the effect that the law attaches to his certificate, are not different, in this particular, from the provisions of the act of 1827, and it has been repeatedly held, in regard to this last act, that it did not change the general commercial law, in regard to the diligence to be used in serving notices of protest, and that that law, merely provided a new mode of proving such diligence." See the numerous cases collected in 1 Hen. Dig., p. 200, § 4, and 209, § 5.

If that means can be resorted to, the law deems it sufficient, and clothes the notary's certificate as to the manner in which he served notices with legal authenticity; but, if that mode cannot be used at all, the holder of commercial paper is not excused, if he has not otherwise used any other practicable way of bringing home notice to the party whom he wishes to charge, and, as such practicable means was readily available, we concur with the decision of *Vechton v. Pruyn*, 3 Kernan, 549, that "as the mail could not be used, it was the duty of the holder to adopt some other means which would be the most certain to bring the notice home to the endorser."

In any contingency, had the notice put into the post-office been duly



transmitted by mail, it would not have been legally served upon the endorser, for it was not properly addressed to him at Napoleonville, as the post-office of that place was neither the one nearest to his residence, nor that at which he was in the habit of receiving his letters, newspapers, etc.

This Court has frequently recognized the rule of the commercial law, with regard to notices of protest, that so far as it requires notices to be sent to the nearest post-office, subject to many exceptions, one of which is where the party to be notified is in the habit of receiving his letters at a more distant post-office, or by a more circuitous route, and that that fact is known.

The great object of the law, says the Court, is to give notice in as speedy and a convenient manner as can be done, and when there is a reasonable compliance with this rule it is sufficient.

Recognizing these principles of the commercial law, we are satisfied, from a careful examination of the whole evidence in this case, that the defendant does not come within any of the exceptions to the rule which requires notice to be sent to the nearest office.

There is much analogy between the present case and that of *Beene v. Tournillon*, 6 Rob. p. 500.

The briefs of both counsel, for the plaintiff and defendant, are ably prepared, but the argument of the plaintiff has not brought us to a different conclusion from the one reached by the Judge of the lower Court, who rendered judgment in favor of the defendant.

The evidence offered by the defendant during the progress of the trial, to prove that *Albemarle* and not the *Napoleonville* post-office was his post-office, was objected to by the plaintiff on the ground that there was no allegation in the answer to let in the proof, and to put him upon his guard; but the Court having received the evidence, a bill of exceptions was reserved.

The evidence was clearly inadmissible, under the general issue, (*Pollard et al. v. Cook et al.*, 4 Rob. p. 199), and the objection to it properly overruled.

It is, therefore, for the reasons above stated, ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby affirmed, at the costs of the appellant.

LABAUVE, J. recused.

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No. 1180.—O. L. BLANCHARD v. H. H. LUCE.

In a suit for the settlement of a general commercial partnership between the partners, a mandate of sequestration is the only conservatory remedy to which the plaintiff can resort. The property is owned jointly, and is undivided, and as the plaintiff is entitled to an equal share with the other partners, of every portion of it, the whole of it must be sequestered.

Points not raised in the lower Court, will not be noticed in the Supreme Court, unless a formal written assignment of errors has been made.

**A** PPEAL from the Third District Court, Parish of Lafourche, *Gates, J. Taylor Beattie*, for plaintiff and appellee. *Clay Knoblock*, for defendant and appellant.

ISLEY, J. This is an appeal from the judgment of the District Court of Lafourche, in a suit for the general settlement of a commercial partnership, overruling a motion on the part of the defendant to set aside a mandate of sequestration, on the following grounds:

1. The writ of sequestration was not the legal remedy.
2. That the affidavit is false.
3. That the affidavit does not disclose any specific sum as due to the plaintiff.
4. That the security on the bond is not solvent.
5. That the lease of the coffee-house was in the name of Luce only.
6. That no cause for the writ is shown, and that it is a harsh measure.

I. The Court did not err in granting, upon a proper showing, the mandate for the sequestration of the partnership effects. The property was owned jointly, and was undivided, and as the plaintiff was entitled to one-half of every portion of it, it was necessary that the whole of it should be sequestered. Art. 275 C. P. § 2. *Seyno v. Sorel*, 11 La. 144.

In *Joor v. Craig*, 3 An. 268, the Court said: "The Code of Practice provides remedies for any contingency which may accompany the property in litigation, and sequestration was the only conservatory remedy to which, in this case, the plaintiff could have resorted. There is no conflict between the opinion expressed, in the case of *Shropshire et al. v. Russell*, 2 An., and our ruling on this point.

II. Facts stated in an affidavit for a mandate of sequestration, are, by legal presumption, taken *prima facie* as true, on the oath of the affiant, until the contrary is shown by sufficient proof (see the case of *Carter v. Lewis*, 15 An. 514); and no counter-proof was adduced by the defendant.

III. Article 275 of the Code of Practice does not require an oath as to the amount due. This is essential in certain provisional orders, but not in the conservatory act of sequestration, in a case like this.

IV. The solvency of the surety on the sequestration bond, which is in due legal form, is shown satisfactorily.

The fact of his being the principal obligor on a bond of administration, for a large amount, is no proof of insolvency. It is conditional, and the law presumes he will do his duty as a fiduciary agent.

V. It is in proof that the plaintiff was a joint tenant of the coffee-house.

VI. We are satisfied, from our inspection of the record, that the plaintiff was legally entitled to the mandate of sequestration.

Another ground is urged in this Court, for the first time, for dissolving the writ; but, as was held in *Carter v. Lewis*, 15 An. 575, new points cannot be made on appeal in this Court, especially when there has been no formal written assignment of errors.

For the reasons stated, it is ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.

No. 58.—R. C. WICKLIFFE, Governor, v. F. M. Dawson et al.

The husband having signed the bond with his wife, his authorization is implied.

A married woman, properly authorized, may bind herself as surety for any other person than her husband.

**A**PPEAL from the District Court, Parish of Madison, *Farraw, J.*  
*James Nolan*, for plaintiff and appellant. *R. D. Jordan* and *F. Fuseleir*, for defendants and appellees.

**TALIAFERRO, J.** This is a suit against F. M. Dawson, sheriff of the parish of Madison, for arrearages on his collection of taxes, alleged to be \$21,649 52. His bond was signed by Samuel Anderson, Henry S. Dawson and his wife, Frances E. Dawson, as sureties. Suit was instituted on the bond against principal and sureties, the latter being bound jointly. The plaintiff prays judgment for the whole amount against the principal, and for judgment likewise, for the same sum, against Frances E. Dawson, the wife, and Samuel Anderson, jointly, alleging the insolvency of Henry S. Dawson at the time of the execution of the bond, and averring the wife to be the real surety, and that her husband subscribed the act merely as authorizing his wife to obligate herself.

Anderson and Henry S. Dawson, in their separate answers, set up various illegalities in the bond, denied that they were bound by it, and if bound at all, it was only to the extent of one-fourth each of the liability. Mrs. Dawson, in her answer, averred that the obligation was without consideration; that she signed the bond without the authorization of her husband, and that she is not bound by it.

Judgment was rendered in the Court below, for the whole sum, against the principal, and against Henry S. Dawson and Anderson, for one-third of the sum each, with interest, as set forth in the judgment. The plaintiff appealed.

We think the judgment of the lower Court erroneous, in exonerating Mrs. Dawson as one of the sureties. The husband having signed the bond with her, his authorization is implied. The obligation is one of suretyship, and it is joint. The disability under which, as a general rule, the wife is placed by our law, to contract for or with her husband, unless it be shown that the obligation inures to her benefit, does not incapacitate her from contracting, as in this case, in favor of third persons. In the case of *Farrel v. Yoe et al.* 2 An. 903, it was decided that a married woman, properly authorized, may bind herself as surety for any other person than her husband. This decision was reaffirmed in the case of *Roberts v. Wilkinson*, in 5 An. 370, by Chief Justice Eustis, after an elaborate review of the Spanish and French laws, and of the jurisprudence of France on this subject.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be amended, so as to include the defendant Frances E. Dawson, against whom judgment is hereby rendered for a like sum with that adjudged against the other two sureties, viz: seven thousand two hundred and sixteen dollars and fifty cents, with interest at the rate of

two per cent. per month, from the 1st day of December, 1858, until paid.

It is further ordered, adjudged and decreed, that the costs in the lower Court be paid, *in solido*, by all the defendants, the costs of this appeal to be paid by Mrs. Frances E. Dawson, defendant.

No. 1214.—EUGENE W. BLAKE *v.* WINCHESTER HALL—And Matters Relating to the Succession of CELESTE BELANGER, deceased.

The absence of the requisite United States internal revenue stamps on letters of administration, and the papers in the proceeding for the appointment of the administrator, is fatal to his appointment.

The prohibition of parol evidence, against or beyond the contents of an act, only extends to the persons who were parties to it.

In case of an insolvent estate, the oath of the several parties creditors is *pro non furit* proof, as required by law, to entitle such creditors to vote in the election of a syndic.

**A**PPEAL from the District Court, Parish of Terrebonne, *Gates, J.*  
*R. D. Jordan and E. W. Blake, for Tanner's heirs. Taylor Beattie,*  
*for Abel Russell. Winchester Hall and Louis Bush, for opponents.*

TALIAFERRO, J. These cases are somewhat interwoven with each other, and counsel having consented that the evidence taken in the first shall apply to the last, it will be convenient to consider them together.

The succession of Mrs. Celeste Belanger, deceased, late widow of Lemuel Tanner, deceased, was opened in the parish of Terrebonne, in the summer of 1864. In October of the same year, J. F. Thompson petitioned for the administration of the estate. An inventory was made, without an order of Court, and no further proceedings were taken, until the 3d day of August, 1865, when Winchester Hall filed an application to be appointed administrator, predicated it upon Thompson's waiver of his right, and, as he alleges, at the instance of several creditors of the succession, having claims against it. Notices of this application were posted up at three different places in the town of Houma, there being at the time no newspaper published in the parish. He filed his bond, which was accepted, and letters of administration were granted to him on the 16th of August, without the requisite internal revenue stamps being affixed to any of the official papers. Louis Bush deposited stamps for this purpose in the clerk's office, on the 24th of August, but they were not affixed. Blake, the plaintiff in this suit, acting (as he avers) at the instance of several of the heirs of the estate, filed an opposition to Hall's appointment, on the 19th of August, and declares that the proceeding of Hall was taken against the wishes of the heirs, and without notice to them. He prayed to be appointed administrator, and that the appointment of Hall be annulled.

Francis L. Mead, by Winchester Hall, his attorney, opposed Blake's pretensions, setting himself up as a creditor, and praying that Hall be continued as administrator.

The case came on for trial on the 14th of September. Judgment was rendered, decreeing the appointment of Hall a nullity, and awarding the

administration to two of the heirs of Mrs. Tanner, Elizabeth Jordan, wife of R. D. Jordan, and to Franklin Tanner, jointly, "upon their compliance with the law in such cases." Hall filed a motion for a new trial. On the 25th of September, the motion for a new trial being overruled, Hall, by motion in open Court, appealed, and filed his appeal bond. Ten days having elapsed in the meanwhile, without the appointees, Jordan and Tanner, having given security, two motions were filed in Court—one on the part of the two heirs who had received the conditional appointment, to be continued in their office provisionally, until the appeal should be determined; the other by sundry creditors, asking the removal of the heirs, and the continuance or appointment of Hall as administrator. On the first of these motions, the Court retained Jordan and Tanner, extending the time for furnishing security to thirty days, and overruled the other motion.

From the judgment decreeing the extension of time to the joint provisional administrators, Mead, one of the creditors, alone appealed. This appeal, forming one branch of this litigation, is now before this Court, and will be disposed of separately.

The controversy now assumed a different aspect. The creditors became clamorous. A writ of sequestration was sued out by J. I. Adams & Co., against the property of the estate, and it was taken into the hands of the sheriff. The heirs appointed in September, 1865, had caused an inventory and appraisement to be made of the whole estate, in November of that year, by which, it appeared, the entire property was estimated to be worth thirty-three thousand dollars; whereas, about a year before, the appraisement of the same property, taken on Thompson's proceedings for the administration, amounted to over one hundred and ninety thousand dollars. At the May term, 1866, of the District Court for the parish of Terrebonne, various creditors united in a petition to the Court, representing that there was no legal representative of the estate, the property in a precarious condition; that the persons named as administrators had failed to furnish the required security, and that a state of things existed which required that the estate should be declared insolvent, a meeting of the creditors called, and a syndic appointed. An order in consonance with the prayer of the petition was rendered by the Court, and a meeting of the creditors called for the 13th of July, 1866. The creditors convened pursuant to the order. Winchester Hall and Robert C. Moore were voted for in the election of syndic. By the return of the notary, who presided at the meeting, it appeared that Moore had received votes carrying the majority in amount. At the ensuing November term of the Court, an opposition was filed to the homologation of the proceedings, complaining of various illegalities in the election, and praying that Hall be recognized as the choice for syndic. The opposition was overruled, and Moore was decreed to be duly elected. A motion for a new trial was overruled, and Thompson and other creditors making the opposition have appealed.

Before entering into the review of the proceedings of the meeting of creditors, it is proper to remark, that about a month previous to the term of Court at which this case was tried, Hall was appointed provisional syndic, and that this appointment was made at the instance of a number of the creditors.



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Against the opposition and application of the plaintiff Blake, for the administration of the estate, the defendant Hall filed an exception, the substance of which is, that the action is revocatory in its character, and can only be conducted by a strict observance of all the formalities required in a regular suit, such as entry of default, judicial delays, etc. The exception being overruled, he answered by averring that he had been regularly appointed administrator, after having complied with the requirements of law; that the proceedings were all regular, and that no cause for his removal existed.

It was shown on the trial, that no internal revenue stamps had been affixed to any of the papers forming the record of proceedings in relation to the estate, and that the notices of his application had not been posted up at three different places in the parish, in the manner required by law, in cases where there is no newspaper published in the parish. By the ulterior proceedings in the sequel of the controversy, it is shown that the defendant was appointed provisional syndic; that he accepted the office, and took an oath to discharge its duties. He received a large vote at the meeting of the creditors, for the office of syndic, and he is now by counsel before this Court, contesting the right of his competitor to that office, and asking to be recognized either as administrator or syndic.

It is urged on the other side, with much force, that the acceptance by the defendant of the office of provisional syndic, and claiming to be elected syndic, is virtually an acquiescence in the judgment decreeing the nullity of his appointment as administrator. That judgment, we are satisfied, was properly rendered. The want of the revenue stamps was fatal to the defendant's pretensions to the office of administrator. With the fact before his eyes, that neither the bond, appraisalment, or letters of administration had stamps upon them, the judge could not do otherwise than treat the appointment as a nullity. The bare inspection of the instruments was conclusive. The revenue laws of the United States declare "that it shall not be lawful to record any instrument, document or paper, required by law to be stamped, unless a stamp or stamps of the proper amount shall have been affixed; and the record of any such instrument, upon which the proper stamp or stamps shall not have been affixed, shall be utterly void, and shall not be used in evidence." U. S. Statutes at large, vol. 13, p. 292, § 152. Bonds for the performance of the duties of any office, and letters of administration, are required to be stamped. Same volume, pages 299 and 300.

In the concurso of creditors, when the election of syndic came on, a strong opposition was made to votes being given on certain promissory notes, purporting to have been drawn by Washington Tanner, as the agent of his mother, the late Mrs. Belanger. It was objected against these notes, that they were executed after the mandate given by Mrs. Belanger to Washington Tanner had expired, and that they have no binding force as debts of her succession.

The mandate was executed before the recorder of the parish of Lafourche, in regular notarial form, on the 9th of January, 1857. It confers general powers to manage the affairs of her plantation, a large sugar estate in the parish of Terrebonne, to sell and dispose of the crops, and apply the proceeds to pay her debts, and defray the expenses of the

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family and plantation. To facilitate the mandatory in the performance of the various acts which he was authorized to perform, Mrs. Belanger granted to him the express power to draw, in her name, all drafts or notes necessary in the liquidation of her debts, and in carrying on the business of the plantation.

This act of procuration was accepted by the same public act, one clause of which is in these words: "It is agreed further, that this agency shall last at least three years, and as much longer, on the same terms, as the parties may mutually agree."

It is admitted by the counsel, maintaining the validity of these promissory notes that most, if not all of them, were executed more than three years after the execution of the mandate. By the conditions of the grant of power, it might continue after the expiration of three years, if the parties should mutually agree to its extension. Parol evidence of the continuance of the power was introduced and admitted. A bill of exceptions was reserved by the opposing counsel. The objection is, that the extension of the agency cannot be proved by parol.

The rule, we apprehend, applies only to the parties, to the act. "The authentic act proves against a third person *rem ipsam*, that is to say, that the transaction which it includes has intervened. Pothier on Obligations, vol. 1, p. 427, No. 704. The same author afterwards says, (No. 766, same volume) it remains to observe that the prohibition of parol evidence against or beyond the contents of an act only extends to the persons who were parties to it. It cannot affect third parties. This doctrine is laid down, and elucidated by Judge Porter in the case of *Barry v. Louisiana Insurance Company*, 11 Martin, p. 630, and it has been frequently recognized in subsequent decisions of this Court. 2 L. 157; 3 An. 464; 4 L. 29.

The exception, we think, was not well taken.

The next objection is to the vote of R. C. Moore, who made oath that he is the owner of two notes deposited by him in the Canal Bank, as collateral security, and were not for that reason then in his actual possession. The vote of L. L. Holcombe is contested on the ground that the claim he offered to represent belongs to his wife, an interdict, without a curator; her husband, up to the time of the meeting, not having qualified in that capacity. Mrs. Holcombe, it appears, is one of the heirs, and it is claimed that she has a tacit mortgage against the property growing out of her rights in her father's estate.

The view we have taken of the claims of Hall, to the administration of the estate, renders it unnecessary to pass upon the opposition to the votes of Pugh, Bruff and Roussel.

The correctness of these different claims, supported by the oaths of the several parties, and, in the case of the notes executed by Washington Tanner, as agent, by some evidence of the extension of the agency, we think the *prima facie* proof required by law, to entitle claimants to vote in the election of syndic, has been made by the parties; and the more so, because we find in the record no testimony of any kind of a rebutting character. Were the votes of Holcombe and Moore excluded, the entire amount would still largely preponderate in Moore's favor.

It is therefore ordered, adjudged and decreed, that the judgment of the

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District Court rendered on the 14th of September, 1865, be affirmed so far as it annuls the appointment of Winchester Hall, administrator of the estate of Celeste Belanger, deceased; and it sufficiently appearing that the appointment of Elizabeth Jordon and Franklin Tanner, as coadministrators of said succession, has become nugatory through their failure to furnish security according to law, for the faithful discharge of the duties of administrators, and their appointment being suspended by the proceedings in insolvency, it is further ordered that the said judgment, as far as it relates to the appointment of said Elizabeth Jordan and Franklin Tanner to said office, be annulled, avoided and reversed, the appellees paying the costs of this appeal, and the appellant the costs in the Court below. It is further ordered, adjudged and decreed, that the judgment of the District Court, rendered on the 30th of November, 1866, homologating the proceedings of the meeting of creditors and appointing Robert C. Moore syndic, be affirmed, with costs in both Courts.

723.—BENOIST KELLER v. THEODORE BLANCHARD, Sheriff, et al.

Whenever the thing sold remains in possession of the vendor, the law presumes that the sale is simulated, and as against third persons this presumption must be rebutted by proof. The payment of a price less than that stipulated in the act of sale, does not make a simulated sale. Defendant cannot seize real property sold, by his debtor, after the authentic act of sale is recorded; and, when enjoined by the purchaser from selling the property, set up the defense that the sale was fraudulent; in such a case his defense is confined to the question of simulation. He must resort to the direct action of nullity, to set aside the sale on account of fraud.

**A**PPPEAL from the District Court, Parish of Iberville, *Posey, J.*  
*S. Mattheus*, for plaintiff and appellee. *O. Laue*, for defendant and appellant.

HYMAN, C. J. Xavier Lambert, having a judgment against Philip Heelein, issued execution thereon, caused to be seized by Theodore Blanchard, sheriff, under the authority of the execution, a lot in the town of Plaquemine, parish of Iberville, known as the "Iberville Hotel," and also a frame building in front of the lot, occupied as a post-office and warehouse, and was proceeding to sell the same as the property of Heelein.

Benoist Keller, the plaintiff, obtained an injunction prohibiting Lambert and the sheriff from selling the property seized, on the ground that he was the owner of the same by a notarial act of sale made to him by Heelein, on the 9th day of August, 1860. He prayed that the property might be released from seizure, etc.

The defendant, Lambert, averred in answer that the sale was simulated and fraudulent, and prayed for the dissolution of the injunction, and for damages.

The District Judge rendered judgment against the defendants, perpetuating the injunction, and ordering the property seized to be released from seizure.

From this judgment the defendant, Lambert, has taken an appeal.

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The evidence shows that Philip Heelein continued to remain on the property after the act of sale was passed.

Whenever the thing sold remains in the possession of the vendor, the law presumes that the sale is simulated, and as against third persons, this presumption must be rebutted by proof. C. C. 2456.

The price that plaintiff bought the property for was, in the act of sale, stated to be three thousand dollars. The act declared that he paid \$1,668, cash, as a part payment of the price, and that for the remainder of the price, say \$1,332, he bound himself to pay a mortgage of that amount on the property sold.

The act of sale made plaintiff responsible for this sum of \$1,332, which he was bound to pay, and if the statement of the payment of \$1,668 was untrue, this assumption of the payment of \$1,332 was a consideration, a price. Even if below the value of the property it was no less a price for the property sold, and there is proof that he paid a part of this price.

The payment of a price for a thing sold, less than that stated in the act of sale, does not make a simulated sale.

A simulated sale of a thing results when parties pass a formal act of sale of the thing, for which no price is given, nor intended to be given.

The evidence proves that there was a real sale of the property in controversy, by Heelein to plaintiff.

Defendant contends that the sale could produce no effect against him until the act of sale was recorded in the office of the Recorder of the parish of Iberville.

This position cannot be denied, (see the act entitled an act in relation to registry, approved March 15, 1855) but the act of sale was recorded in the office of the recorder (as shown by his certificate) on the 2d May, 1861.

The law considered that, as to third persons, the property was Heelein's until the act of sale was recorded in the office of the recorder, and, therefore, any rights or liens that a third person had acquired on the property, as against Heelein, before the act of sale was recorded, are valid.

There is no proof that defendant acquired any right or lien, by seizure or otherwise, on the property sold to plaintiffs, previous to the recording of the act of sale. Indeed there is no proof of seizure, except what the allegations of plaintiff establish, and they do not show that the seizure was made before the act of sale was recorded.

Defendant cannot seize real property sold by his debtor after the authentic act of the sale of the same is recorded, and when enjoined by the purchaser from selling the property, set up the defense that the sale was fraudulent. Under such circumstances, his defense is confined to the question of simulation. He must resort to the direct action of nullity to set aside the sale because of fraud.

Judgment of the District Court is affirmed.

LABAUVE, J. recused.

No. 1168<sup>1</sup>.—JOHN H. FLEETWOOD v. CHARLES BORDIS et als.

The legal or tacit mortgage, existing in favor of minors against their tutor, cannot be erased or canceled, without substituting a special mortgage in the stead thereof, in the manner prescribed by the act of the Legislature of 11th of March, 1830, re-enacted in 1855.

The law has created the tacit mortgage in favor of minors; and its provisions, to cancel it by substituting a special one, must be strictly observed.

**A** PPEAL from the District Court, Parish of Assumption, *Beauvais, J. J. Roman*, for plaintiff and appellant. *A. Gentile*, for defendant and appellee.

**LABAUVE, J.** This case involves but one question purely of law; it is this:

Can the general mortgage, in favor of minors against their tutors, be canceled and erased, without being replaced by a special one, as prescribed by act of 11th March, 1830, re-enacted in 1855?

After the death of his wife, who left five minor children, issue of their marriage, Chas. Bordis caused a portion of the community property to be adjudicated to him, at the price of estimation, as provided by Art. 338 of the C. C.; among that property was the undivided half of a certain town lot and buildings, in the town of Thibodeaux, jointly owned by said community and Dr. Dominique Durac, which lot the said Bordis and Durac subsequently sold for \$4,500, payable in five installments, to John H. Fleetwood, the said Charles Bordis binding himself, in the act of sale to have erased and canceled, within a reasonable delay, the tacit mortgage bearing on said property in favor of his minor children.

Pursuant to this agreement, he applied to the District Court of the parish of Assumption, by a petition, in which he alleged the said sale, that he had bound himself to procure the erasure of the tacit mortgage bearing on the undivided half of said lot, in favor of his minor children; that by reason of the losses sustained by him during the late war, in slaves and certain debts, he is not able to procure to his children a good education, without the sum due him by said Fleetwood; that his only son (Gaston) is now nineteen years old, and petitioner desires to afford him the benefit of a liberal education, so as to enable him to become the supporter of his younger sisters; that he desires, likewise, his daughters to receive a liberal education; that there is, belonging to the succession, a lot of ground situated in Thibodeaux, valued in the inventory at \$1,000; that the dwelling-house thereon was destroyed by soldiers and contrabands, and that said property is now unproductive; that petitioner, if permitted to recover the amount due by Fleetwood, would be able to put some buildings on said lot and make it produce revenue, and thereby also increase the security of the rights of the minors.

That petitioner would desire the calling of a family meeting of his children, for the purpose of deciding whether it would not be for the best interest of the minors, after due consideration of the facts above stated, that the sale from petitioner to Fleetwood be ratified, and that the tacit mortgage in favor of said minors, on the lot of ground sold, be raised.



Wherefore, your petitioner prays that said family meeting be called, and that Ozimé Melançon, the under-tutor, be notified to attend the same."

This family meeting being duly ordered, appeared together with the under-tutor, before C. Carmanche, recorder, and, after mature deliberation, declared that they were unanimously of opinion that it was for the greatest interest of the minors that the sale mentioned above be ratified, and that the tacit mortgage in favor of the minors, bearing upon the lot of ground sold, be raised, giving many reasons in detail, including those alleged in the petition.

Upon a petition being presented to the judge to that effect, he ordered the homologation of said deliberations; that the said sale be ratified; that the special mortgage which may have resulted from the adjudication of said lot to Charles Bordis, and the tacit mortgage bearing against him as tutor, in favor of his minor children, be annulled and raised. This judgment was rendered and signed on the 10th July, 1865.

John H. Fleetwood, the purchaser of said property, alleging his interest in this matter, took an appeal from said judgment, on the 9th June, 1866.

The history of this case shows that there existed on this property two mortgages—one special, resulting from the adjudication to the father, and a tacit one from the tutorship. Civil Code, Arts. 338 and 3282.

Charles Bordis, the natural tutor, never offered to give, nor did he give, a special mortgage, as prescribed by act of 11th March, 1830, and reenacted in 1855, p. 444, where it is provided that the surviving father or mother, becoming tutor or tutrix, may give a special mortgage for the security of the rights of their children, and for the faithful discharge of their functions, provided a family meeting shall declare that the property offered to be specially mortgaged, is, in their opinion, of sufficient value to secure the rights of the minors, in capital and interest. § 7.

That, in case of adjudication made, under Art. 338 C. C., a special mortgage may be given on real property, not slaves, and shall have the effect of annulling the mortgage arising from such adjudication. § 8.

Notwithstanding the family meeting may have found the property sufficient, it is made the duty of the judge to cause the property offered to be mortgaged to be appraised by experts; and the judge *shall in no case* accept the mortgage, unless the value of the property exceed, of all prior liens, the amount of the debts or rights of the minors, by at least twenty-five per cent. the amount due the minors, to be ascertained by a previous liquidation, to be made according to law, and including all interest which will probably accrue. § 13.

It is perceived that these formalities were not and could not be complied with in these proceedings, for the simple reason that no property was offered to be mortgaged specially. But Charles Bordis contends that the present case is governed by that of *Fontenelle v. Oezay*, 1 An. 236. It appeared in that case, that the house in which the natural tutrix lived with her children, was rapidly falling into decay and ruin; that it was in a condition which endangered the lives of herself and children, and that, unless it was soon repaired, she would be without shelter for herself and family, and she owned no other dwelling, and was des-

titute of pecuniary means with which to make the necessary repairs, and she prayed to be authorized to sell, free from the mortgage of the minors, a sufficient number of town lots to defray the required expenditure. A family meeting advised the sale of a specific quantity of land to meet the expenses of the masonry, another to cover those of the wood-work, etc.

This Court, in that case, said :

"The act of 1830 presents no obstacle to the release of the tacit mortgage in favor of minors, in cases like the present, nor has it reference to such cases. Among the duties which devolve upon tutors are those of providing for the maintenance, health and personal safety of their wards, in the execution of which the property of the minor himself may be sold, and, if necessary, the capital may be used. In the present instance, property subject to the minors' mortgage has been sold, for the purposes for which their own might have been validly alienated, and with the further view of promoting the security for their estates from being diminished, by selling a part, and reinvesting the price in valuable improvements upon the remainder. Here has been a mere mutation of the property, by which the rights of the plaintiffs were secured, and made with an apparent necessity for the change."

We must confess that the case, although it is not parallel with the one at bar, is very strong; but it is the only one known in our jurisprudence, and must make an exception, whilst the case before us is one of ordinary occurrence : where a natural tutor wants to sell, or has already sold, a property which is mortgaged to his children, and he needs his money, like everybody else ; all that he has to do, to evade the law, is to allege that he wants it to educate, maintain and support his children, and to make some improvements on other property; but the money is his property, and he may do what he pleases with it after it is received. This is the case before the Court. If we depart from the law quoted above, enacted to protect and secure the minors' rights, there is no stopping place; the law would become a vain thing.

The law has created the tacit mortgage in favor of the minor, and its provisions, to cancel it by the substitution of a special one, must be strictly observed. *Lesassier v. Dashrill*, 17 L. 194. In the present case, there is a total absence of the formalities prescribed by law.

We are of opinion that the judgment appealed from is correct in the ratification of the adjudication of the lot to the father, at the price of estimation, but is illegal and unauthorized as to the annulling and erasing of the special and tacit mortgages in favor of the minor.

It is therefore ordered and decreed, that the judgment rendered below be affirmed, so far as it ratifies the adjudication of the lot at its appraised value, and that it be annulled and avoided so far as it cancels and erases the special and tacit mortgages, and that the appellees pay costs in both Courts.

No. 1207.—ESTATE OF THOMAS MILLE, and of his Wife, PAULINE DUPUY; MARIE EUGENIE BRAUD and Husband *v.* MICHEL HEBERT—A. BONNACHAND, Clerk, Garnishee.

A draft or note filed in a suit may, by garnishment process, and interrogatories served upon the clerk of the Court, in whose custody it is, be attached in a suit instituted in another Court; and if his answers disclose possession of the draft the service is good.

To make a valid seizure of tangible property, the sheriff must take actual possession of it. Delivery to the sheriff of property, under seizure, is necessary to enable him to make a valid sale.

**A** PPEAL from the District Court, Parish of Pointe Coupee, *Cooley, J. Barrow & Pope, and P. A. Roy*, for plaintiffs and appellants. *Zenon Labaure*, for defendant and appellee.

**ILSLEY, J.** A judgment creditor of the defendant, having caused a writ of *feri facias* to be issued, and while the writ was in the sheriff's hands, she filed a petition of garnishment on the clerk of the Seventh Judicial District Court, for the parish of Pointe Coupee. The garnishee, in answer to interrogatories propounded to him, states that he has, as clerk of the District Court, property in his possession belonging, as it appears from the pleadings in suit No. 585, to Michel Hebert; and, further, that the suit No. 585, entitled *Michel Hebert and Eugénie Braud v. John and Alcide Chastant*, is on file on the records of said Court, also that the notes described in the petition in garnishment are among the papers of said suit, and that they are in his possession as clerk aforesaid, and he annexes a copy of the same. As no legal sale of the said notes could be made by the sheriff until that officer obtained the corporeal possession of the same, the plaintiff, basing his motion on the clerk's answer, asked the Court that an order be granted directing the clerk and garnishee to deliver to the sheriff the notes, that he might proceed to sell the same.

The Court below overruled and discharged the motion, holding that it had no power to order the clerk to give up the notes, deeming, however, the possession of them by the clerk to be that of the sheriff, and at the same time ordered the clerk to retain the notes until further orders, so that the rights of the plaintiff, the seizing creditor, might not be prejudiced, and from this judgment the plaintiff has appealed.

The question submitted to us is not a novel one, having been frequently presented for solution to our predecessors, who do not seem to have doubted the right of the Court to grant such an order as the one in this case sought to be obtained. See *Stinsbury v. McCall*, 8 An. page 9, and *Price v. Emerson*, 7 An. 237. They hesitated, however, to lay down any definite rule in regard to the interfering with the possession by the clerks of Courts, of records and documents of which he was the legal custodian, being apprehensive that evil consequences might result from it.

In the case of *Price v. Emerson*, 7 An. 237, it was intimated that if in that case the apparent title to the notes was in the defendant in execution, the validity of the seizure, under a writ of *feri facias*, would have been recognized, and an order for the delivery of them would have been granted.

In a subsequent case, *Woodworth v. Lemmexman*, 9 An. 524, the Court

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said that without an actual seizure, or a citation in garnishment, there could be no attachment, and that service of a mere notice on the clerk, who is the legal custodian of the records of his Court, or even on the debtor against whom a suit is pending (the course pursued in the case of *Price v. Emerson*), has no more effect than publication in a newspaper would be.

In a late case, *Edler v. McAlister*, 14 An. 821, the Court adopting the view taken in the *Woodworth v. Lemmerman* case, as to the effect of a proceeding by garnishment, which the plaintiff in the case now before us has adopted, held, unequivocally, that a draft filed in a suit may by garnishment process, and interrogatories served upon the clerk of the Court in whose custody it is, be attached in a suit instituted in another Court, and that if the clerk's answer disclose possession of the draft the seizure is good.

To make a valid seizure of tangible property, the sheriff must take actual possession of it (6 A. 531, 581. 4 A. 369); and a copy of the notes in this case seized, if taken by that officer, would be nugatory. *Scott v. Wible*, 6 A. 182.

It is necessary, therefore, that a delivery of them be made to the sheriff, in order that he proceed to the sale of them under the writ in his hands.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered that the clerk of the District Court deliver to the sheriff of the parish of Pointe Coupee the notes filed in Court in the suit of *Michel Hebert and Eugénie Braud v. John and Alice Chastant*, No. 585, on the docket of the said District Court (retaining collated copies thereof), to be sold and disposed of according to law, to satisfy the writ of *feri facias*, in his hands, issued from the District Court of Iberville, in the suit of *Eugénie Braud and Husband v. Michel Hebert, in the matter of the succession of Thomas Mille*.

It is further ordered that the costs of the appeal be taxed as costs in the said suit, in which execution issued.

LABAUVE, J. recused.

No. 1212.—WILLIAM WHITE, Administrator, et al. v. ELIZA BLANCHARD and Husband, F. COONEY et al.

The action of separation of the patrimony of the deceased from that of the heirs, is prescribed in three months from the date of the express or tacit acceptance of the heirs. C. C. Art. 149.

Article 1005 of the Civil Code is in harmony with the articles thereof specially applicable to the payment of the debts of the succession. The remedy awarded by the former Article lasts as long as does the action for the separation of patrimony, and no longer.

Plaintiffs being mere ordinary creditors of the succession, their action is a personal one against each one of the heirs, to recover from him his virile share of his ancestor's debt, and plaintiffs have no legal right to stay, by injunction, the defendant's order of seizure and sale. Even privilege or mortgage creditors cannot arrest execution, but must resort to the remedy by third opposition, to stay the proceeds of sale in the sheriff's hands until the conflicting rights of preference to the fund can be determined.

The plea of prescription of five years, on a promissory note, will be maintained when the evidence shows no interruption for that length of time.

APPEAL from the District Court, Parish of West Baton Rouge, *Posey, J. Barrow & Pope*, for plaintiffs and appellants. *Farrot & Lamon*, for defendants and appellees.

LSLEY, J. The petitioners in the present injunction suit claim to be creditors of the succession of Elize Bret, widow of Zepherin Blanchard, who died intestate in the year 1858, leaving (heirs of her body) twelve children, and a succession, consisting of a sugar plantation, slaves, movables, etc.

All her children being above the age of majority, accepted her succession *purely and simply*, and took possession of her whole estate, without any legal formality.

On the 6th February, 1859, four of the heirs of Widow Zepherin Blanchard sold to the remaining eight, for the consideration of \$48,000, part in cash and the balance in installments, represented by notes, payable in 1860, 1861 and 1862 (four notes of \$3,333  $33\frac{1}{3}$ , each year), all their right, title, claim and interest, to the said property, real and personal, particularly described in the act of sale; and the better to secure the full and punctual payment of the said notes, the said property, land, slaves, etc., remained specially mortgaged to the vendors, or any holder of the said notes, and until the full and final payment thereof; it being, moreover, understood, that the purchasers should pay all the debts of their deceased parents. The object of the plaintiffs' injunction suit was to arrest proceedings under the defendants' order of seizure and sale, and to obtain security for their claims, and, in default of such security, to provoke the appointment of an administrator to administer the succession of the Widow Zepherin Blanchard, according to the provisions of the section relative to the benefit of inventory, all in accordance with Article 1005 of the Civil Code.

The defendants moved to dissolve the injunction on the face of the papers, for the grounds stated in the motion, with twenty per cent. damages on the sum enjoined, and special damages, five hundred dollars for attorney's fees. The defendants in injunction answered; admitted that they are a part of the heirs of Elize LeBert and Zepherin Blanchard, their father and mother, deceased; that they accepted the succession left them by their parents *purely and simply*, and kept the property thereof undivided until they sold their shares to their co-heirs, on the 16th February, 1859;

That the plaintiffs acquiesced in the sale, and in the assumption of the purchasers to pay the debts of their deceased parent;

That, if the plaintiffs have any right of action, it is to prosecute against the heirs of Elize LeBert, jointly, under their acceptance pure and simple of her succession, and against each for his virile portion thereof.

The motion and the merits were tried together, and the District Court rendered a judgment in favor of the plaintiffs, and against all the heirs of Elize LeBert, Widow Zepherin Blanchard, for the amount claimed; recognized the debt as one of the succession of the said widow, dissolved the injunction, and gave judgment in favor of the defendants against the plaintiffs, in the sum of five hundred dollars for attorney's fees, costs, etc., and from this judgment the plaintiffs have appealed.

The question to be now solved under the pleadings is, whether the ordinary creditors of Elize Bert, Widow Zepherin Blanchard, whose children of lawful age, having accepted her succession *purely and simply*, and against whom and their creditors, the action of the creditors of the



succession, for the separation of the patrimony of the deceased from that of the heirs, is prescribed under Art. 1409 of the Civil Code, have any other than a personal action against the heirs; and, whether the patrimony of the deceased is to be specially subjected to their claims against the succession, notwithstanding the blending together of the two patrimonies, i. e. that of the succession and those of the heirs?

Article 1370 of the Civil Code accords to the creditors of a succession three kinds of action, to cause themselves to be paid the debts due them by the deceased, to wit:

1. A personal action against the heirs, or those who stand in the place of the heirs;
2. An hypothecary action against the detainers or possessors of the property mortgaged for their debts;
3. And the action of the separation of the patrimony of the deceased from that of the heir.

The last of these actions for a separation of patrimony, can only be resorted to within *three months* from the express or tacit acceptance of the heirs. After the expiration of *this term it is not admitted*. Article 1409, Civil Code.

"In the interval between the opening of the succession and the three months allowed for the institution of the suit for the separation of patrimony, the heir cannot alienate, affect nor sell the effects of the succession, nor any of them, to the prejudice of the creditors; and if he does it, the creditors may cause the acts to be declared null, as done in fraud of their right. It is the reverse, after the expiration of the three months." See 1141 C. C.

The filing in Court of the plaintiffs' injunction suit, which virtually claimed a separation of patrimony, was long subsequent to the expiration of the delay, computing it from the date of the tacit acceptance of the succession of Mrs. Zepherin Blanchard by the heirs. See 982 and 986, Civil Code.

Article 1005 of the Civil Code is in harmony with the articles thereof specially applicable to the payment of the debts of a succession. The remedy awarded by the former article lasts as long as does the action of the separation of patrimony, and no longer, otherwise there would be no limit to the exercise of the action "of the separation of patrimony."

The plaintiffs being mere ordinary creditors of the succession, their action was, when they instituted it, a mere personal one against each of the heirs, to recover from him his virile share of his ancestor's debt, and they stand upon the same footing as do the creditors of the heirs.

Marcadé, commenting on the Articles of the Napoleon Code, in regard to the separation of patrimony, explains the legal effect produced by the blending of the two patrimonies—that of the deceased with that of the heir, and also the effect which the law attaches to the separation of these patrimonies.

He observes: "Nous avons vu sous l'art. 802, que l'héritier (tout en acceptant cette qualité pour en invoquer le bénéfice, s'il y a lieu) peut suspendre actuellement les effets ordinaires de l'acceptation, c'est-à-dire la transformation légale en celle du défunt, et la confusion qui en résulte entre les deux patrimoines; en sorte que les deux masses de biens restent

séparées, tout comme si le défunt vivait encore. Or, ce droit accordé à l'héritier de maintenir séparés l'un de l'autre les deux patrimoines, est également attribué aux créanciers par notre article 878, et il est étendu aux légataires par l'article 2111. Ainsi, de même que l'héritier peut obtenir la séparation des patrimoines, quand il craint que la succession ne lui apporte plus de dettes que de biens; de même les créanciers et légataires peuvent la demander aussi, quand ils craignent que l'héritier n'ait plus de passif que d'actif, et que la confusion des deux patrimoines en un ne diminue la somme qu'ils doivent recevoir sur les biens laissés par le défunt.—Ainsi, quand le défunt laisse 60,000f. de biens et 50,000f. de dettes, et que l'héritier, au contraire, n'a que 20,000f. d'actif pour un passif de 50,000f. également, la confusion des patrimoines ne donnerait à tous les créanciers, soit de la succession, soit de l'héritier, que 80 pour cent; tandis que la séparation de ces patrimoines donnera aux créanciers héréditaires un actif plus que suffisant pour l'acquittement intégral de leurs créances. Si nous supposons qu'avec 50,000f. de dettes le défunt ne laisse que 30,000f. de biens, la séparation sera encore utile aux créanciers héréditaires puisqu'elle leur assurera 60 pour cent; tandis que la confusion produirait un actif total de 50,000f., pour un passif total de 100,000f., c'est-à-dire, 50 seulement pour cent. Vol. 3, p. 276, § 391.

It results from the examples put with such pertinence by the learned commentator that the mingling together of patrimonies, places the ordinary creditors of the succession, and of the heir, upon an equal footing. "Il est vrai qu'il y a désormais confusion des patrimoines, en sorte que tous sont tombés au rang des créanciers personnels de l'héritier: il n'y a plus qu'une seule masse de biens, qu'un seul débiteur qu'une seule classe de créanciers," 397, ib. En un mot, il n'y aura alors qu'une seule classe de créanciers ayant tous le même débiteur, et parmi tous ces créanciers, on appellera, comme en toute autre circonstance; 1. Les privilégiés, s'il y en a; 2. Les hypothécaires; 3. Enfin les créanciers chirographaires, ib. § 397.

As mere ordinary creditors of the heirs of Widow Zepherin Blanchard, the plaintiffs had no legal right to stay by injunction the proceedings under the defendants' order of seizure and sale, although the property seized had been the patrimony of the plaintiff's debtor, the defendants' mother.

Even privilege or mortgage creditors cannot arrest executions, but must resort to the remedy of third opposition to stay the proceeds of sale in the sheriff's hands, until the conflicting rights of preference to the fund can be determined.

The plea of prescription of five years is urged against the plaintiffs' action on the notes sued on. It is shown that interest was paid on the note for \$2,420, held by William White, administrator up to the 3d March, 1862, and on the note for \$550, held by his co-plaintiff, up to the 6th March, 1860.

The first note was not prescribed, but we find nothing in the evidence to show that prescription was suspended as to the note on which interest was paid, on the 6th March, 1860, and as service of process in this case was only made on the 3d January, 1866, more than five years had

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elapsed between the date of the interruption and that on which service of process was made on the defendants.

In this particular, the judgment of the lower Court must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court, so far as it condemns the defendants, the four children and heirs of Widow Zepherin Blanchard, to pay the plaintiffs, Joachim Aillet, the note for five hundred and fifty dollars, with interest, etc., be and the same is hereby annulled and reversed; and it is further ordered, adjudged and decreed that, as regards the said note, judgment be rendered in favor of the defendants.

It is further ordered, adjudged and decreed, that in every other particular, the judgment of the lower Court be and the same is hereby affirmed, at the costs of the appellant.

No. 1213½.—MRS. M. B. HARP v. DUNCAN F. KENNER.

Where the holder of a promissory note seeks to bind the endorser, it must be shown that due diligence has been used in making demand, and giving notice; and the impossibility of giving notice at an earlier date.

**A**PPEAL from the District Court, Parish of Ascension, *Beauvais, J.*

*N. H. Rightor*, for plaintiff and appellant. *Johnson, Denis, Berault and Legendre*, for defendant and appellee.

HOWELL, J. This suit is brought against the endorser on the following note:

"\$2,000.

RICHMOND, VA., 23d February, 1862.

In all March next (1863) we or either of us promise to pay *in solido* to the order of Duncan F. Kenner, at the office of the recorder of the parish of Ascension, La., two thousand dollars, for value received.

(Signed) L. D. NICHOLS.

(Endorsed) Pay MRS. H. B. HARP, or order.

(Signed) DUNCAN F. KENNER."

Plaintiff alleges that at the maturity of said note the maker was dead and unrepresented; the holder was within the military lines of the United States forces, and the endorser, Kenner, was in Richmond, Va., within the lines of the Confederate forces, and, consequently, demand could not be made nor notice given to the endorser; that at the close of the war the endorser was in foreign countries, but as soon as plaintiff was apprised of his return, and as soon as demand could be made of the legal representative of the maker, she gave notice of demand and non-payment to, demanded payment of him.

The defendant, besides the general issue, sets up special defenses, that no consideration passed between him and the maker or holder; that the obligation is inchoate, the plaintiff having taken the note from said Nichols with the knowledge that the endorsement would be void, if the note was not signed by another solidary obligor with said Nichols; that said note has not been duly presented for payment, protested for non-payment, nor notice thereof given to defendant as required by law.

It is shown that Nichols died in 1862; that his widow obtained letters

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of tutorship in the parish of Ascension, on 31st July, 1865, and the first session of Court held in that parish in the same month; that the recorder's office in said parish, where the note falling due on 1st April, 1863, was made payable, was burned in October, 1862, and reopened on 29th March, 1865; that plaintiff, in 1863, resided in Ascension; that Kenner, during the war, was a representative in the rebel Congress, went to Europe at the close of the war, and was seen in New Orleans in October, 1865; that demand of payment was made of the representative of Nichols's estate, in the latter part of January or first of February, 1866, and notice thereof given to, and payment demanded of, Kenner within two weeks thereafter. The estate of Nichols is admitted to be insolvent.

From these facts it is evident that a demand might have been made at the recorder's office, where the note was payable, as early as March or April, 1865, and of Mrs. Nichols, tutrix, in August of that year, and in the year 1863, as widow, and notice could have been given to Kenner in October or November, 1865. Neither was done until the end of January, and in February, 1866. The facts do not, in our opinion, excuse the delay in making a demand and giving notice. It was incumbent on plaintiff, even under her own allegations, to show the impossibility of complying with those requisites at an earlier date than she did, which she has failed to do.

Judgment affirmed, with costs.

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No. 774.—LUCIEN JEX, Administrator *v.* EMILE TUREAUD.

Demand of payment should be made upon the very day a note becomes due.

Any inevitable accident, irresistible force or unforeseen occurrence, which could not be provided against, is a sufficient excuse for non-presentment.

It must, however, be patent, real and as a natural consequence.

An excuse arising from such a cause, *vis major*, must also disappear with it.

It is not necessary that demand be made, nor that notice of dishonor be given by a notary. These requisite may be performed by any person, lawfully in possession of a note, and competent to testify as a witness.

When payment of a promissory note cannot be demanded at the time and place of its maturity, a demand should be made as soon after as practicable.

By the President's proclamation of March 31, 1863, commercial intercourse was interdicted until May, 1865.

Promissory notes being the property of a succession, and two months having elapsed from the restoration of commercial intercourse between the sections, in which the several parties resided, before the appointment of an administrator: *Held*—That neither demand nor notice is required until reasonable time after the appointment of an administrator.

**A** PPEAL from the District Court, Parish of St. James, *Beauvais, J. Berault & Legendre*, for plaintiff and appellee. *Gaudet & Roman* for defendant and appellee.

ILSLEY, J. The administrator of the succession of the late Robert Many, sues the defendant to recover from him as the endorser of the following described promissory notes, the several amounts thereof, with interest and costs:

1. A note for \$452, payable on the 1-4 January, 1862.
2. A note for \$2,400, payable on the end of March, 1862.
3. A note for \$452, payable on the 1-4 January, 1863.
4. A note for \$452, payable on the 1-4 January, 1864.
5. A note for \$5,650, payable on the 1-4 January, 1864.

The demand is resisted by the defendant, who, besides pleading the general issue, denies all liability as the endorser of the notes declared on, for the following reasons, viz:

That the notes endorsed by him were not presented, and payment thereof demanded at the time and place, when and where they became due; that no diligence was shown by the plaintiff, or any previous holder of the said notes, in presenting them for payment, or in having them protested at the time and place of their respective maturity; that the notes could and should have been protested before the period at which the plaintiff states that protest was made, viz: *on the 26th July, 1865.*

The Court below rendered judgment in favor of the plaintiff for the amount of the two notes, 4 and 5, maturing in January, 1864, but dismissed his action for those which were payable in the years 1862 and 1863, and from this judgment the defendant has appealed.

It is a settled rule of the commercial law, that a demand should be made of the maker of a note on the very day on which by law it becomes due, and unless the demand is so made it is generally a fatal objection to any right of recovery against the endorser, although the maker himself may, and will be liable on the note. This rule, although apparently harsh, and, perhaps, severe in its practical operation, yet is, for the general purpose of business, highly useful to the commercial community by introducing promptness, fidelity and exactness in the demand of payment. See Story.

There are, however, exceptions to the rule: "Any inevitable accident or irresistible force, or unforeseen occurrence, which could not be provided against, will constitute a sufficient excuse for non-presentment, etc., at the maturity of the note."

Such accident, irresistible force or unforeseen occurrence, must, however, be patent, real, positive, and, as a natural consequence; excuses derived from any such cause, *vis major*, as they arise with, and are dependent on, such cause must also disappear with it.

The special grounds relied on by the plaintiff to bring him within the exception to the general rule in regard to the demand, etc., are:

1. The presence of political circumstances and civil war, amounting to a virtual interruption of all ordinary negotiations of trade and intercourse with the State of Louisiana and the parish of St. James.

2. The state of war between the Northern and Southern sections of the United States.

3. The occupation of the State of Louisiana and the parish of St. James by Confederate forces, which suspended commercial intercourse and access to said parish and State.

4. Public and positive interdictions and prohibitions of the United States and blockades, which obstructed and suspended commercial intercourse with the said State and parish.

5. The absence of the late Robert Many from the State of Louisiana, and his sojourn, detention, illness, and death in the city of New York.

6. The absence of civil, judicial and ministerial officers, and the closing of their offices and of the Courts of justice in the parish of St. James.

7. The succession of Robert Many being unrepresented until the



appointment of the petitioner as administrator, and his qualification as such on the 26th July, 1865.

As regards the notes which matured in January of the year 1862 and 1863, we can perceive no reason why the judgment of the lower Court, in regard to them, should be disturbed; for, supposing that Robert Many had these notes with him on his arrival in New York, in June, 1861, there was from the time of the capture of New Orleans, by the United States army in April, 1862, open, free and uninterrupted communication by regular public conveyance between New York, New Orleans and the parish of St. James; and as all that part of Louisiana, in which are situated New Orleans and St. James, were then and continued to be "occupied and controlled by the forces of the United States," etc., commercial intercourse between New York, New Orleans and St. James parish, was by the proclamation of the President of the United States of July 1st, 1861, not deemed unlawful, and did not become so until it was so declared by the proclamation of 31st March, 1863.

The office of recorder of the parish of St. James, was filled until the 15th June, 1862. It was again in operation in December of that year, and was not afterwards vacated. There was then ample time to make demand of payment of the notes, which became due in January and March, 1862, and in January, 1863, as Robert Many died only on the 28th August, of 1863; retaining all his mental vigor until the time of his demise.

It was not necessary that the demand should have been made nor notice of demand and non-payment given by a notary. These requisites might have been performed and proved by any person lawfully in possession of the notes, and competent to testify as a witness. See *Lathrop v. Lawson*, 5 An. 238; 11 Rob. 454; 15 La. 552, and *Burke v. McKay*, 3 How. 71.

The two notes due in January and March, 1862, could not have been presented for payment to the drawer at the time and place of their respective maturity, but a demand should have been made, etc., as soon after as was practicable. *Pothier Fouté du contrat de Change*. Partie 1, chap. 5, § 144.

No valid excuse is shown for the non-performance of the requisites of the law, as to demand and notice in regard to the notes, which fell due in 1863.

We concur, therefore, with the Judge of the District Court, that the holder of the notes, which matured in 1862 and 1863, by his negligence and want of diligence, has lost all recourse against the endorser of them.

The two notes payable in 1864, stands upon a different footing. It is true, they were not protested until many months after their maturity; but by the President's proclamation of March 31, 1863, commercial intercourse was interdicted until the end of the rebellion, which was virtually suppressed in the month of May, 1865, by the surrender to the United States forces of the last of the Confederate armies.

Two months elapsed between that event and the date of the protest, and, under ordinary circumstances, that unnecessary delay would have been fatal; but, it seems that no administrator was appointed to the succession of Robert Many until the very day on which the protest was made. Under the commercial law, which in cases like this, is not in conflict with

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the positive injunctions of our statutes, neither demand nor notice are required until a reasonable time after the appointment of an administrator. See Story on Promissory Notes, sec. 250, and Parsons on Bills and Notes, page 360.

No laches is imputed to the administrator, and as the endorser was duly and legally notified of the protest of the notes due in 1864, he is liable therefor.

For the reasons assigned by the Judge of the lower Court, and those now given by this Court —

It is ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.

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No. 1230.—ELLEN HACKETT *v.* JACOB SCHIELE AND ZEBULON YORK.

In a suit on a promissory note, where the defendant pleads that the consideration was money loaned to a third party, he is not entitled to have that third party called in warranty.

**A**PPEAL from the District Court, Parish of Concordia, *Farrar, J.*  
*Mellen, Leach & Adams*, for plaintiff. *J. Ker, G. S. Sawyer*, and *Farrar & Reeves*, for defendants.

**LSLEY, J.** This is a suit upon a promissory note, drawn by the defendants *in solido*, to the order of, and endorsed by, James Hughes. The defense is the general issue; and it is alleged in the answer, that the consideration of the note sued on was money loaned to Leonard W. Warren, who resides in New Orleans, Louisiana, or at least for his use and benefit, and that he received the said money, which was paid over to him at that date, or very soon after; and that the said Warren then and there expressly undertook and promised to pay the said obligation to the holder and owner of the said note, for and on account of the defendants, and that the defendants are entitled by law to call him in warranty to defend this suit; wherefore, they pray that the said Warren be cited in warranty, etc.

The Judge of the Court below thinking that, under Arts. 379, 380, 381 and 382 of the Code of Practice, he had no discretion, granted the call in warranty and the delay necessary for that purpose, thereby continuing the cause till the next term of the Court; whereupon the plaintiff reserved her bill of exceptions to the ruling of the Court, and has appealed from this interlocutory judgment, as one likely to work irreparable injury.

We think the Judge of the lower Court erred in granting the defendant a continuance in this case, as he does not even allege in his answer that there existed any privity between Leonard W. Warren and the plaintiff. This, in the case of *Anselm v. Wilson*, reported in the 8 La. R. 37, and in a late case decided by this Court at Natchitoches, it was held, does not present a case of simple or personal warranty, within the meaning of that part of the Code of Practice which authorises delay for calling in the war-

rantor. See Code of Practice, Art. 379 et seq.; 5 Merlin's Reports, verbo guarantie simple.

It is therefore ordered, adjudged and decreed, that the order of the Court below to continue the case be rescinded, and that it be proceeded with according to law. It is further ordered, that the appellee pay the costs of appeal.

No. 106.—E. P. WHITEHEAD et als. v. J. M. WATSON et als.

The testator, Asa H. Mitchell, in his last will bequeathed to his executors certain slaves *in trust*, for the purpose that they should pay over to his mother annually, during her lifetime, the net income and revenues of said slaves, and after her death to convey them, with their natural increase, if any, to her children, *per stirpes*, in full warranty: *Held*—That such a disposition is reprobated by our Code.

Under the Constitution and laws of the United States and of Louisiana, the Courts can render no decree recognizing property in man.

**A**PPEAL from the District Court, Parish of Tensas, *Farrar, J.*  
A. N. Ogden and T. P. Farrar, for plaintiffs and appellees. *Reeves & Collier*, for defendants and appellants.

HOWELL, J. The defendants have appealed from a judgment annulling, as contrary to law, a clause in the will of Asa H. Mitchell, deceased, made in 1859, by which he *bequeathed to his executors certain slaves, in trust*, for the purpose, that they should pay over to his mother annually, during her lifetime, the net income and revenues of said slaves, and after her death convey them, with their natural increase, if any, to her children or their descendants, *per stirpes*, in full ownership.

This, in our opinion, is a disposition reprobated by our Code; but, if there were any doubt on this point, it is manifestly one which our Courts cannot now execute, as there is no such property to be conveyed by will or otherwise. We think that, under the constitutions and laws of the United States and Louisiana, this Court can render no decree recognizing property in man.

At the date of its rendition by the lower Court, the judgment appealed from was, in our opinion, in accordance with positive law then in force; but now, so much of it as awards the slaves described therein and their possession to the plaintiffs is absolutely null.

The appellees, however, cannot properly be held liable for costs of appeal.

It is therefore ordered, that so much of the judgment of the District Court as relates to the ownership and possession of the persons therein named as slaves be declared null and void, and that, in other respects, the said judgment be affirmed, with costs.

No. 1183.—JAMES A. FROST *c.* MILES A. McLEOD.

A party cannot attack collaterally a judgment by an opposition to a monition. The title of one who purchases property, sold under execution issued on a judgment, from which a devolutive appeal had been taken, will not be affected by a reversal of the judgment.

**A** PPEAL from the Third District Court, Parish of Lafourche, *Gates, J. Bush & Goode*, for plaintiff and appellee. *E. W. Blake*, for defendant and appellant.

**TALIAFERRO, J.** At a probate sale of property of the succession of James Frost and his wife, Elmira E. Ragan, both deceased, made in July, 1859, Miles A. McLeod became the purchaser of a house and lot in the town of Thibodeaux. In conformity with the terms of sale, McLeod executed three several promissory notes, with one surety bound with him *in solido*. A special mortgage containing the *pact de non alienando* and the vendor's privilege were retained on the property, in favor of the succession. The notes were drawn payable to the order of John C. Ragan, tutor. In November, 1865, James A. Frost having attained the age of majority, made a partial settlement with his tutor, and received in part of the amount coming to him from the succession of his parents, two of the notes of McLeod, on which there was then due \$1,538 70. He proceeded to enforce the payment of these notes by taking out an order of seizure and sale of the mortgaged premises. He provoked the appointment of a curator *ad hoc* to represent McLeod, who was an absentee. The property was sold, and Evanste Maronge became the purchaser and received the title. The curator *ad hoc* took a devolutive appeal from the order of seizure and sale, pending which Maronge, the purchaser, obtained a monition, which was duly advertised. The curator filed an opposition to the homologation of the monition, and stated various grounds for the opposition. The monition was duly homologated by the Court, and the opponent has appealed.

The several objections to the alleged illegalities in the proceedings, by which the order of seizure was taken out, and by reason of which, it is argued, the sale is null, are clearly untenable, as a party is not allowed to attack collaterally a judgment, as in this case, by an opposition to a monition. 2 N. S. 292. 14 L. 214. 19 L. 198.

The assignment of the two notes sued upon by Ragan, tutor, to Frost, is objected to as contravening Article 355 of the Civil Code. The provisions of that article seem to be exclusively for the benefit of the minor. In this case the minor, now of full age, seeks to give effect to the agreement made with his tutor, by enforcing the obligations acquired from him.

But, the property mortgaged having been sold, and a vested right acquired in it by virtue of its adjudication to Maronge at the judicial sale, the defendant can no longer maintain the pretension of ownership. The appeal taken from the order of seizure and sale was only devolutive. It did not prevent the execution of the order. A sale of the property under

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execution was made, and the purchaser acquired a title to it, which would not be divested by a reversal of the judgment. This principle is well settled in our jurisprudence. See N. S. 8 vol. p. 214 ; 1 Rob. 94 ; 2 An. 211.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

No. 1205.—VICTOR ARMANT et als. v. MARCILIEN BOURGEOIS.

An appellant must bring into the Supreme Court all the parties who have an interest in preventing a reversal or modification of the judgment of the lower Court.

**A** PPEAL from the District Court, Parish of St. James, *Beauvais*, J. *Fred. Landreaux*, for plaintiffs and appellants. *F. P. Porché*, for defendant and appellee.

HYMAN, C. J. This is a petitory action brought by plaintiffs against defendants, for a certain tract of land in the parish of St. James, wherein they not only claim judgment for the land, but ask for a judgment against the defendant for \$1,908, for the revenues of the land while in defendant's possession, claiming them as damages.

The defendant, in answer, called in warranty his vendor of the land, Louis Palms (who had warranted defendant's title to the same), and asked that, if plaintiff recovered judgment against him for the land and damages, he have judgment against Palms for the amount of damages decreed against him in favor of plaintiffs, and also for the price that he had paid him for the land, with interest.

Defendant also prayed for judgment against plaintiffs for improvements put by him on the land.

The District Judge rendered judgment decreeing that plaintiffs were owners of the tract of land ; that defendant recover from plaintiffs the value of the improvement put by him on the land, and that defendant recover from Palms the price he paid for the land, with interest.

From this judgment plaintiffs have appealed, without making Palms, the warrantor, a party to the appeal.

No revenues were allowed plaintiffs in the judgment.

Palms, the defendant's vendor and warrantor, is interested that the judgment of the lower Court be maintained, as regards revenues ; for, if judgment for any amount was rendered in this Court, in favor of plaintiffs, against defendants for the same, a like judgment should be rendered in favor of defendant against Palms. See Code Practice, Art. 385. Civil Code, Art. 2482.

On appeal from a judgment of a lower Court, appellant must bring into this Court all the parties in the suit, who have an interest to prevent the reversal or modification of such judgment. See 9 La. R. 473.

Let the appeal be dismissed.



## 1209.—STATE v. J. H. SYPHER AND J. L. PETIT.

The charge of "enticing away from deponent, H. E. Moore's plantation, certain freedmen laborers," is not an offense known to our law.

**A** PPEAL from the District Court, Parish of Iberville, *Posey, J.*  
*R. W. Knickerbocker*, District Attorney, for the State. *Sheldon & Parde*, for defendants and appellees.

**TALIAFERRO, J.** This is an action brought in the name of the State to recover from the defendants the sum of seven hundred and fifty dollars, the amount of a recognizance bond executed by Sypher as principal, and by J. L. Petit as his surety, conditioned for the appearance before a justice of the peace of the parish of Iberville, to undergo a preliminary examination on a charge of "enticing away from defendant, H. E. Moore's plantation, certain freedmen laborers," which bond, it is alleged, was declared forfeited by the failure of the accused party to appear.

The defendants set up exceptions, in which they allege various nullities in the proceedings taken against them, and disclaim any liability on the bond sued upon.

The exceptions were sustained in the Court below, and judgment rendered in favor of the defendants.

The plaintiff has appealed.

The bond is obviously defective, and cannot be enforced. It specifies no offense known to our law. No time is fixed for the appearance of the defendant, and no place is designated at which he is to appear. One of the conditions is, that the accused "shall well and faithfully appear and answer at preliminary examination before justice's Court, when called upon to answer charges preferred as aforesaid."

It is not shown that the accused was notified to attend. The judgment of the lower Court was properly rendered.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

## No. 1198.—S. R. STRIBLING v. C. D. STEWART.

In a suit upon an open account, composed of distinct contracts, not exceeding five hundred dollars each, one witness to each item is sufficient, although the aggregate amounts to more than five hundred dollars.

**A** PPEAL from the District Court, Parish of Pointe Coupée, *Cooley, J.*  
*Beatty & Yoist*, for plaintiff and appellee. *Edward Phillips*, for defendant and appellant.

**HOWELL, J.** This is a suit upon an open account, composed of various items sold at different dates, and the only question presented by counsel of defendant and appellant, is whether or not the proof is sufficient—one witness only having testified to the correctness of each item, no one of which is over \$500, although the aggregate is considerably over that sum.

The account sued on indicates clearly that there were separate and distinct contracts, at different dates, in relation to each item or several of them together, and the fact that the same person was witness to each of those contracts, does not affect the sufficiency of his testimony upon the whole account, so to require corroboration, as contemplated by Art. 2257 C. C. He may be regarded as a witness to prove several agreements relative to personal property, embraced in one demand, no one of which exceeds \$500, and for the aggregate of which judgment is authorized.

We think the proof is sufficient in law.

Judgment affirmed.

No. 1184.—UNION BANK OF TENNESSEE *v.* FRANCIS E. ROBERTSON et al.

If presentment of a promissory note cannot be made at maturity, on account of irresistible power, the holder will not be deprived of his right against other parties, provided he makes presentment and gives proper notice, within a reasonable time after he has the power to do so. The holder is never bound to an impossibility.

**A**PPEAL from the District Court, Parish of Terrebonne, *Gates, J.*  
*Breaux & Fenner, and Winchester Hull*, for plaintiff and appellant.  
*Bush & Goode*, for defendant and appellee.

HYMAN, C. J. Plaintiffs sued to recover judgment against F. E. Robertson and Mrs. C. P. Danks, *in solido*, for \$7,694 23, with eight per cent interest thereon from the 9th of January, 1863, on a note of said amount, bearing that rate of interest from its maturity.

The note was dated the 9th of April, 1862, and was payable to the order of C. P. Danks, nine months after date, at the office of Geo. Connelly & Co., in New Orleans. It was endorsed by Mrs. Danks, specially, to Geo. Connelly & Co., and by them endorsed in blank.

The note was presented for payment on 20th July, 1865, at the office of Geo. Connelly & Co., in New Orleans.

On the refusal of Geo. Connelly & Co. to pay the note when presented, it was protested for non-payment, and due notice thereof given to Mrs. Danks.

The District Judge rendered judgment against F. E. Robertson, and dismissed the suit of plaintiffs against Mrs. Danks.

From the judgment of dismissal the plaintiff has appealed, and the question to be decided is, whether plaintiff has shown sufficient excuse for not sooner presenting the note for payment.

The proof is that the Confederate forces, in September, 1862, took the note out of plaintiff's possession, and all control of the note was withheld from the plaintiff by these forces, and that plaintiff did not regain possession of it until July, 1865. As soon as plaintiff recovered possession of the note it was forwarded to New Orleans to be presented for payment, and payment was demanded as stated above.

If presentment cannot be made on the maturity of the note, because irresistible power prevents, the holder will not be deprived of his right

against other parties on the note, provided that he makes presentment and give proper notice, within a reasonable time after he has power to do so.

The holder is never bound to an impossibility. See Story on Promissory Notes, p. 259.

Defendant Danks has moved to dismiss the appeal, because the defendant Robertson has not been made a party to the appeal.

There is no necessity for making Robertson a party to the appeal.

His liability will not be affected by any judgment that may be rendered by this Court, for or against plaintiff or defendant Danks.

Let the judgment of the District Court, dismissing plaintiff's suit against C. P. Danks, be reversed; and further, let there be judgment in favor of plaintiff and against C. P. Danks, for the sum of seven thousand six hundred and ninety-four dollars and twenty three cents, with interest thereon at the rate of eight per cent. per annum, from the 12th day of January, 1863, till paid, and for the costs of this suit.

No. 1194.—In the Matter of the Sheriffalty of the Parish of Pointe Coupée, LEON B. DAYRIES, claiming to be recognized as Sheriff.

Where an appeal bond is given in a case not mentioned in the order of appeal, the appeal will be dismissed. The order must state clearly from what case the party wishes to prosecute his appeal.

**A** PPEAL from the District Court, Parish of Pointe Coupée, *Cooley, J. Race, Foster & Merrick*, and *Beatty & Yoist*, for W. R. Falconer, appellant. *Cooley & Phillips*, for L. B. Dayries, appellee.

HOWELL, J. A motion is made to dismiss this appeal on the ground, among others, that there is no legal order of appeal in any cause pending before the District Court, contained in the record.

The order is in the following form:

"*State of Louisiana, in Relation to the Application of L. B. Dayries.*—On motion of Wm. Beatty, attorney for Wm. R. Falconer, it is ordered that a devolutive appeal be granted him from the judgment of this Court, either on the opposition or *mandamus* against him, or the writ of *quo warranto*, on said appellant giving bond and security, conditioned according to law, in the sum of two hundred and fifty dollars, said appeal returnable at the Supreme Court, on the 4th Monday of January, 1867."

It appears that Leon B. Dayries applied *ex parte* to the District Court of Pointe Coupée, to be recognized as the sheriff of said parish, by virtue of a commission in due form from the Governor of the State; that Falconer presented a written opposition to said application being granted, on the ground that he was the legal and acting sheriff by virtue of an election and commission, and was under no disability, and that no vacancy existed to be filled by the governor.

No issue seems to have been formed, and no evidence taken. The

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Judge caused an order to be entered on the minutes, recognizing Dayries as the sheriff, who was sworn in and his commission placed on record. Two days thereafter, Dayries obtained a writ of *mandamus* directing the said Falconer to deliver to him the records, papers, etc., of the office, and the keys of the jail. After hearing the parties, the *mandamus* was made peremptory, and, subsequently, Falconer obtained a writ of *quo warranto* upon Dayries, to show by what authority he held and exercised the office of sheriff; to which the latter excepted, and the exception maintained. It is apparent, from these proceedings, that the order of appeal is defective, and not such as to maintain an appeal. It does not authorize an appeal from the three judgments, and the appellant has not made an election of the one from which he desired to prosecute his appeal, but is claiming to have all three reversed, and, besides, the bond of appeal is given in a proceeding not mentioned in the order of appeal. We cannot, as suggested by counsel, presume that the word "*or*" in the order should read, and was intended to be "*and*." The use of the two disjunctives "*either*" and "*or*," forbids such a presumption. Nor can we consider the irregularity one which can be corrected under the 16th section of the act of 1866, organizing this Court. The record does not indicate that the error can be imputed to the judge, clerk or appellee. The appellant must have known from what judgment or judgments he wished to appeal, and in what proceeding he gave his bond of appeal.

We feel compelled to discountenance such loose and irregular practice, which must result in great confusion, and render the course of justice uncertain and insecure.

It is therefore ordered that the appeal be dismissed, at the costs of the appellant.

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No. 1216.—J. McWILLIAMS & Co. *v.* THE CORPORATION OF THE TOWN OF PLAQUEMINE.

It is the province of a jury to find the facts of a case: but the finding must be upon evidence.

**A**PPPEAL from the District Court, Parish of Iberville, *Posey, J.* *Barrow & Pope*, for plaintiffs and appellants. *Benjamin & Deblieux* and *Talbot & Petit*, for defendant and appellee.

TALLIAFERRO, J. We learn from the record in this case that, in the month of May, 1862, the mayor and selectmen of the town of Plaquemine, under the apprehension that the town would soon be taken by Federal forces, deemed it a matter of prudence and precaution to destroy all the intoxicating liquors in the place, to avoid their falling into the hands of the soldiery, who, under the baneful influence of drunkenness, might commit acts of violence and outrage. To this end, squads of men went through the town and accomplished this purpose, by emptying of their contents barrels, bottles, and whatever else they found that contained ardent spirits. It seems that an estimate was made at the time of the quantity of liquors destroyed, in reference to future compensation to be made to the owners. Several individuals afterwards received payment for their losses, although it was not in every case satisfactory.

McWilliams & Co. v. The Corporation of the Town of Plaquemine.

The plaintiff in this suit was a loser by the prudential act of the town council, whose estimate of the damage he had received he was unable to concur in. He therefore instituted this suit, claiming three hundred and fifty-nine dollars, which he alleges to be the value of the liquors destroyed, and twenty-seven dollars and sixty-one cents, the amount due him by the corporation for articles of merchandise furnished it on account. He prays judgment for the aggregate sum of three hundred and seventy-six dollars and sixty-one cents, with five per cent. interest thereon from the 1st of May, 1862.

The answer is a general denial. The case was tried twice, and each time by a jury. In the first instance the jury disagreed; in the last, a verdict was rendered in favor of plaintiffs for ninety dollars. The plaintiff has appealed.

We are unable to see the ground upon which this judgment was rendered. The liability of the corporation was clearly established beyond any doubt. The town council admitted this, but assumed to fix the amount of its own indebtedness; and the jury seems to have sustained the council in the course it pursued. The plaintiffs' account was fully proved. Two or three witnesses testified that eighty-nine gallons of whiskey belonging to the plaintiffs were destroyed, and that whiskey, at the time, was selling at from \$3 50 to \$4 per gallon. One witness swore that from twenty-five to forty bottles of whiskey and cordials were also destroyed at the same time, and that the plaintiffs' charge for twenty-seven bottles of cordials is correct. The additional small account, for nails and other articles, was admitted. No proof of any kind whatever was adduced to show that the plaintiffs' account, or any part of it, is incorrect.

It is the province of a jury to find the facts of a case; but the finding must be upon evidence. In this case the evidence has been entirely disregarded, and the jury seem to have acted as a kind of amicable compounders. Law and equity require a reversal of the judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; it is further ordered, that the plaintiffs recover from the defendants, in their corporate capacity, the sum of three hundred and seventy-six dollars and sixty-one cents, with five per cent. interest thereon, from the first day of May, 1862, until paid, and costs of suit in both courts.

LABAUVE, J. recused.

#### No. 1157.—SUCCESSION OF THOMAS E. VICK.

By the death of a creditor, his universal legatee, who is one of the forced heirs, becomes a creditor in his stead.

**A**PPPEAL from the District Court, Parish of Lafourche, *Gates, J. Bush & Goode*, for appellant. *Belcher & Beattie*, for appellee.

**LSLEY, J.** This is a contest for the curatorship of the vacant and intestate succession of Thomas E. Vick, who died in the year 1866.



The applications of Charles C. Williams and of Americus V. Williams, were filed in Court, respectively, on the 12th and 16th of April, 1866.

As Charles C. Williams was the one who first "presented his demand" (Art. 1117 C. C.), and he had in the opinion of the judge, the requisite qualifications, and offered sufficient security, he appointed him sole curator of the succession. R. S. 78, § 12.

The only point we deem it necessary to determine is, whether C. C. Williams, as one of the forced heirs, and the universal legatee of his father, I. C. Williams, deceased, who was a creditor of Thomas E. Vick, became, by the death of his father, a creditor of Vick.

We think he did, in virtue of Articles 866, 867, 934, 936, 939 of the Civil Code, as expounded by this Court in the case of *LePage and others v. The New Orleans Gas Light and Banking Co. and others*, 7 Rob. p. 184; and *Addison v. New Orleans Saving Bank*, 15 La. 528.

The other points raised are satisfactorily disposed of by the Judge of the lower Court; and for the reasons by him given and with the opinion expressed by us.

We find no error in the judgment of the lower Court.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.

#### NO. 1211.—THE STATE OF LOUISIANA *v.* TROZIN P. BILBO.

Where an indictment is found more than a year after the alleged committing of a crime, other than willful murder, arson, robbery, forgery and counterfeiting, to be valid it must allege upon its face facts that will negative prescription.

**A**PPEAL from the District Court, Parish of Rapides, *Cooley, J.*  
*David Pierson*, District Attorney, for the State. *Sherburne and Daigre*, for defendant.

**LABAUVE, J.** The indictment charged that Trozin P. Bilbo, late of the parish aforesaid, on the — day of June, A. D. 1865, with force and arms, in the parish, district and State aforesaid, and within the jurisdiction of the Ninth Judicial District Court, one bay horse, of the goods and chattels of John Swartzenburg, Jr., of the value of one hundred dollars, feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of said State.

The grand jury found a true bill, which was exhibited and filed on the 6th day of October, 1866.

The accused, by his counsel, filed a motion to quash the indictment, on the ground, that the crime alleged to have been committed is barred by prescription; that the same facts as contained in the indictment were made known to a public officer having power to investigate, but no action was had or taken.

The State of Louisiana v. Bilbo.

Wherefore, he prays that the indictment be quashed, more than a year having elapsed since the alleged crime was committed, and that the accused be released, the statute of limitation having prescribed the action.

The District Court sustained the motion, and the district attorney took a bill of exceptions and moved for an appeal, which was granted.

We are of opinion that the Court did not err. It was the duty of the State to negative in the indictment the fact that prescription had accrued, by alleging that no information of the commission of the offense had, within one year next after the offense, been given to an officer authorized to direct the investigation or prosecution.

On its face, the indictment does not contain everything essential to the punishment of the accused, and which must have been found by the jury before sentence could be rendered. R. S. p. 161, § 11. *The State v. Foster*, 7 An. 255. We have lately reaffirmed that decision.

Judgment affirmed.

No. 1210—STATE OF LOUISIANA v. DOAX & THOMPSON and EDWARD I. GAY.

Where there is no principal obligation, there cannot be an accessory one.

**A**PPPEAL from the District Court, Parish of Iberville, *Posey, J.*

*R. W. Knickerbocker*, District Attorney, for the State. *Barrow & Pope*, for defendants and appellees.

HYMAN, C. J. The State is appellant from a judgment dismissing suit brought against defendants, on an appearance bond signed only by Gay, as security for Doax and Thompson.

Doax and Thompson, not having signed the bond, are not bound. Neither is Gay bound on the bond, for there cannot be an accessory obligation where there is not a principal one. See 2 Rob. 367, *Curtis et al v. Moss*.

Let the judgment of the District Court be affirmed.

No. 1201.—JOHN L. POINTER *v.* C. N. ROTH et al. and E. D. WOODS, Sheriff.

An injunction will be sustained, where the property has been sold, and delivered, prior to the date of the seizure by the sheriff, under a writ of *fiery facias*; when the injunction is maintained in part no damages will be allowed.

**A**PPEAL from the District Court, Parish of Iberville, Posey, J.  
*Barrow & Pope*, for plaintiff and appellee. *Samuel Matthews*, for defendants and appellants.

LABAUVE, J. This appeal is taken by defendant from a judgment perpetuating an injunction, restraining the defendants from selling three mules, four cows and calves, and carriage, and a buggy, valued at \$690.

On the 21st of April, 1860, the defendants sold to A. P. Marionneaux, all their interests in a certain sugar plantation, and the implements of husbandry and the animals thereon. Having obtained a judgment against Marionneaux for the price, they seized under a *fiery facias* the plantation and all the animals and movable property thereon, including the said three mules, cows and calves, carriage and buggy, the sale of which said John L. Pointer enjoined, alleging that he had purchased them previous to the seizure, and that they were his property.

The District Court, after hearing his testimony, perpetuated the injunction, and the defendants took this appeal.

From the testimony adduced in the case, we are satisfied that the four cows and calves, the carriage and the buggy, were sold and delivered to the plaintiff, John L. Pointer, and were in his possession; but, we are of opinion that the three mules, if they were sold, were not delivered to said John L. Pointer, and that they remained in the possession of the alleged vendor, A. P. Marionneaux, until they were seized. The testimony shows that A. P. Marionneaux had leased his sugar plantation, together with the said three mules to Renold, who was notified by A. P. Marionneaux that he (Marionneaux) had sold the three mules to Mr. J. L. Pointer, and that at the expiration of the lease to turn them over to Mr. Pointer; the mules seized are the same that were leased with the plantation, and alleged to have been sold to Pointer. When the mules were seized they were in the possession of the lessee, and, consequently, in that of the lessor and alleged vendor, and could be seized by the creditors of the latter. Civil Code, Arts. 1916, 1917, 2243, 2456, 3396. 1 An. 59. 3 An. 462.

We must dissolve the injunction, as to the mules, but are of opinion that no damage should be allowed, the injunction being sustained in part as to the cows and calves, and carriage and buggy, and dissolved as to the mules for want of delivery.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled and avoided. It is further ordered and decreed, that the injunction be maintained, and made perpetual as to the carriage, buggy and four cows and calves, and dissolved as to three mules; the defendants and appellants to pay the costs of the District Court, and the plaintiff and appellee those of appeal.

## No. 1151.—SUCCESSION OF GYLLUM A. HUDSON.

To constitute a prohibited substitution, the donee must be charged to preserve and return the thing donated, to a third person.

The doctrine enunciated in the case of *Cyprien Roy et al. v. Etienne Latodas et al.* 5 An. 532, is reaffirmed in this case.

**A** PPEAL from the District Court, Parish of Pointe Coupée, *Cooley, J. I. J. Cooley*, for Test. Executor. *Ju'ien Michel*, for absent heirs, appellants.

**LABAUYE, J.** This case presents but one question of law, and that is, whether the last will of the said Gyllum Hudson contains a *prohibited substitution*, in the following donations :

"Article 2. I give and bequeath to my half-sister, Nancy Stiles, formerly Nancy Estiss, five thousand dollars.

Article 3. I give and bequeath to my half-nephew, Thomas Harrell, son of Samuel Harrell, four thousand dollars. \* \* \* \* \*

Article 10. I wish the above-named Nancy Stiles and Thomas Harrell to *use* their portions, both principal and interest, as they see proper, during their natural life; and should they leave heirs of their body at their death, I wish it to be equally divided among them ; but, should they die leaving no heirs of their body, I wish it, or *whatever may be left of it at their death*, to be divided equally among *all those who are now my legal heirs.*"

The executors, on a fourth account rendered by them, have put down for the heirs and legal representatives of said legatee, Thomas Harrell, deceased (who has died since the last payment of \$2,000 to him on account of his legacy), \$800.

Julien Michel, counsel of absent heirs, opposed said item, on the following grounds :

"That, by article 10 of the will, it was provided that if the legatees, Nancy and Thomas Harrell, should die without leaving heirs of their body, the legacies given to them, or so much thereof as should be left, should not go to their heirs at law, but should go to the heirs of the testator."

That said Harrell has died without heirs of his body, and with a portion of the legacy to him still unpaid; that the said legacy is either null, as a *fidei commissum*, or the remaining portion of it yet unpaid, should, in accordance with the will of the testator, go now to his legal heirs. He prays that the executors be ordered to pay said legacy to the heirs at law of the deceased.

To constitute a prohibited substitution, the donee must be charged to *preserve and return* the thing donated, to a third person. Civil Code, Art. 1507. The motive of the law is, that property should not be tied up and taken out of commerce, which would be the case if the donor had the right and power to direct to whom should go the donation after the death of the original donee, for the donor might do so *ad infinitum*.

In this case we see nothing which binds the legatee to *preserve and return*; on the contrary, the testator wishes the legatees to *use* their portions, both principal and interest, as they see proper.

We are clearly of opinion that the above legacy does not contain a prohibited substitution, and that the legatee, Thomas Harrell, became absolutely the owner of the legacy made to him, and transmitted the same to his heirs at law. Our views are fully supported by the decisions in the cases of *Cyprien Roy et al. v. Estibene Latolas et al.* 5 An. 552; *Bernard's Heirs v. Souè*, 18 La. 21; *Bernard's Heirs v. Goldenbow*, 18 La. 95; *Marchadé*, vol. 3, No. 460.

For these reasons, and those given by our learned brother below, with whom we concur, the judgment appealed from must be affirmed.

It is therefore ordered and decreed, that the judgment of the District Court be affirmed, with costs.

No. 825.—JAMES A. FROST *v.* MILES A. MCLEOD.

Where an order of seizure and sale has been obtained on a mortgage, and the debtor who granted the mortgage is absent from, and not represented in the State, the law does not require antecedent proof or affidavit of his absence, before an attorney can be appointed to represent him.

The nullity declared by Article 353 of the Civil Code, is relative, and cannot be urged by the minor, after he becomes of age, who is seeking the benefit of the alleged agreement, by which a partial payment or advance was made to him.

The transfer of the principal obligation includes that of the mortgage as the accessory. C. C. 2613.

**A**PPEAL from the District Court, Parish of Lafourche, *Belden, J.*  
*Louis Bush*, for plaintiff and appellee. *E. W. Blake*, for defendant and appellant.

**HOWELL, J.** This is an appeal from an order of seizure and sale, and is taken by the attorney appointed to represent the defendant, who is alleged in the petition to be absent, and not represented in the State.

The grounds of complaint are:

1. That there is no proof that the defendant is absent, and not represented.

To this, it is successfully replied, that the Art. 737, C. P., under which the appointment of an attorney was made, does not require the plaintiff to make oath of the fact of absence, as contended for, and it is not suggested that authentic evidence of such fact is required: nor is it intimated that the defendant is not absent.

The article in question simply provides that, if the debtor, who has granted the mortgage, is absent and not represented in the State, the Judge, *at the request of the plaintiff*, shall appoint him an attorney, to whom notice of the demand shall be given in the manner directed, and contrarily with whom the seizure and sale shall be prosecuted. It does not say *on proof* of the absence, and we are not informed of any law requiring such antecedent proof. The analogy to the conservatory writs is not maintained, as, in those proceedings, facts to be verified by oath are made by law a basis of the writ.

2. That the assignment of the notes to plaintiff is absolutely null and void, having been made by a tutor to his ward, previous to the rendering



of a full account and delivery of vouchers, under the provisions of Art. 355, C. C.

The nullity declared by this article is relative, not absolute, and is in the interest of the minor, and cannot be urged in this instance, as it is the minor, now of age, who is seeking the benefit of the alleged agreement, by which a partial payment or advance was made to him. 9 L. 305. 10 L. 268. 1 A. 35.

3. That there is no authentic proof of plaintiff's subrogation to the rights of mortgage.

The transfer of the note was by notarial act, and by Art. 2615, the mortgage, as the accessory, was included.

We consider it unnecessary to pass upon the question of the want of a stamp, as it is not properly presented by the record.

Judgment affirmed.

1162.—LOUIS GUION, Administrator *v.* THE CREDITORS OF THE SUCCESSION OF GEORGE GUION, deceased.

Judicial bonds must be construed with reference to the law under which they are given.

A jury trial is not allowed on an opposition to the proces-verbal of the deliberations of the creditors of an insolvent succession; such proceedings must be tried summarily.

The opinion of a majority of the creditors, in amount, must prevail.

**A**PPEAL from the District Court, Parish of Lafourche, *Gates, J.*

*Bush & Goode*, for appellee. *Winchester Hall*, for opponents and appellants.

LSLEY, J. A meeting of the creditors of the succession of George S. Guion, having, upon the application of the administrator, an order of the Judge, been duly held, the proces-verbal of their deliberations was returned to the Court, and the homologation thereof, and a sale of the succession property in conformity thereto, prayed for.

The prayer of the administrator was opposed by the appellants, and from a judgment against them upon their opposition, they have appealed.

The appellees have moved in this Court to dismiss the appeal, on two grounds:

1. That the appeal bond does not comply with the requisites of the law by reciting, "or that the same shall be satisfied by the proceeds of the sale of his estate, real and personal, etc.," as required by Article 570 of the Code of Practice; and

2. That the bond is made in favor of the administrator alone, and not in favor of the creditors, who, in the present instance, are really the only parties having interest.

I. Judicial bonds must be construed, with reference to the law under which they are given; any clause which is superadded must be rejected, and any that is omitted supplied. 12 An. 69. 4 An. 3. 11 La. 174 and 196.

II. It is contended by the appellant, that the bond was properly made in favor of the administrator, who represents them until their claims

are settled in *concurso*; but the Court entertaining some doubt as to the necessity of making the creditors parties in the present case, well maintained the appeal. 10 A. 235. 2 A. 434.

On the merits—the opposition to the homologation of the proceedings of the meeting of the creditors, rested on two grounds:

1. That the opponents are prejudiced by the appraisement of the property, made on the 24th November, 1865.

2. That they are entitled to have the tracts of land sold in parcels, and not in block, as required by the other creditors.

There are two bills of exception taken by the opponents to the refusal of the Court to allow them a trial by jury, and to receive evidence offered by them to sustain the second ground, and to show that a sale of the property, in parcels, would be more advantageous than one made in block.

The ruling of the Court, in both points excepted to, was correct.

Proceedings of this nature must be tried summarily by the Court, (755 757 and 1036 C. P.,) and the evidence offered being irrelevant and useless, was properly excluded.

The meeting of the creditors was called in pursuance of Articles 1160 of the Civil Code, and of 1038 of the Code of Practice, and the succeeding Article 1039, contemplates that the deliberations of creditors convened by virtue of the preceding article, shall be homologated in the same manner as if it were a procedure in bankruptcy, and that the Court will pronounce summarily on such opposition as shall be made.

This Court, in the case of *Nedre v. Fontenet*, 2 An. 784, intimated that Article 1039 of the Code of Practice, had reference to the insolvent acts of 1817, and the acts amending it, and we are of the opinion that it alluded to the insolvent law of 1817, which was the only one in operation when the Code of Practice was promulgated in September, 1825.

By the acts of 1817, as well as by the existing law, in relation to voluntary surrenders, the opinion of the majority of the creditors, *in amount*, for the sale or disposal of the property surrendered, or for any other object relative to the interest of the mass of the creditors, shall prevail to give such deliberations of the creditors legal effect, in regard to sales of property, they must be homologated by a judgment of the Court (2 A. 784); but the opinion of the majority, in amount, will prevail in fixing the mode, terms and conditions of such sales, unless successful opposition is made on account of some irregularities or illegality in the proceedings at the meeting of the creditors, and the Court very properly rejected the opposition, and adopted the opinion of the creditors, in amount, as the basis of its judgment of homologation, and for a sale of the property in conformity to the said opinion, and according to law.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be and the same is hereby affirmed, the costs of appeal to be paid by the appellants.

## No. 1150.—J. C. VANWICKLE P. W. D. V. DOWNING.

In order to bind the drawer or endorser of a draft, the evidence must show that a demand has been made in due time.

Where plaintiff seeks to hold the drawer and endorser of a draft responsible on a subsequent promise, he must show by evidence that the defendant knew, at the time he made the promise, that he was released from liability by the laches of the plaintiff.

**A** PPEAL from the District Court, Parish of Pointe Coupee, *Cooley, J. Thos. J. Cooley*, for plaintiff and appellee. *F. H. Farrar*, for defendant and appellant.

HYMAN, C. J. Jacob C. Vanwickle, the plaintiff, brought suit in May, 1866, against William D. V. Downing, on two drafts drawn by him on R. C. Cummings & Co., of New Orleans, payable to his own order, and by him endorsed in blank.

Each draft is for the sum of \$6,750, is dated at New Orleans, 24th February, 1861, payable twelve months after its date, and signed and endorsed thus: "Wm. D. V. Downing."

The drafts were accepted by the drawers.

Plaintiff prayed that he have judgment against defendant for the amount of the drafts, for interest thereon, for costs of protests and for costs of suit.

Defendant, in answer, admitted his signature to the drafts sued on, but denied responsibility on the drafts.

The District Judge rendered judgment as asked for by plaintiff, and defendant has appealed from the judgment.

Plaintiff adduced in evidence protests, of the 27th February, 1862, for non-payment of two drafts, which differ from the drafts sued on only in the name of the drawer and endorser.

The drafts protested were drawn by J. D. V. Downing, and by him endorsed in blank; and the protests show that, on the 27th February, 1862, demands for their payment were made on the acceptors, R. C. Cummings & Co.

Plaintiff also introduced in evidence the certificates of the notary (who protested the drafts), who therein declared that he served notices of the protests on the drawer and endorser, by depositing on the day of the protests, in the post-office of New Orleans, the notices addressed to J. D. V. Downing, at Morganza post-office, Louisiana.

The protests do not show that demands were made for the payment of the drafts sued on; on the contrary, they show that demands were made for the payment of other drafts.

It is impossible for the drafts that are protested to be the drafts that are in suit, if the protests declare truth.

It is unnecessary to inquire whether the notices of protests are sufficient or not; for, if there be no proof of demands for the payment of the drafts at their maturity, the plaintiff cannot recover. No such proof has been adduced.

Vanwickle v. Downing.

Plaintiff, not relying fully on the protests and certificates of notices of protests, offered in evidence a letter of defendant's, which is as follows:

"Mr. Vanwickle—Dear Sir: R. C. Cummings wrote me, a few days ago, that you held some of his and my paper, and wishes to pay it. You will write to me immediately, as I wish to confer with him on the subject. My advice is to accept the offer. The manner in which property is on the wing, I do not think many debts will be settled after this war, for I firmly believe everybody will be broke, and universal repudiation will be the game.

Respectfully yours,

WM. D. V. DOWNING.

Bayou Ferdoche, Monday, June, 1863."

By interrogatories on facts and articles, propounded to defendant, plaintiff proved that the paper referred to in the letter was the drafts now sued on; and plaintiff contends that, by this letter, the defendant acknowledged his liability to pay the drafts.

If the letter be a promise by defendant to pay the drafts, or an acknowledgment of his liability to pay them (and on which we express no opinion), and the plaintiff expects thereby to escape from the consequence of his laches, he must show by evidence (which he has not done), that defendant knew when he wrote it, the letter, that he was released by laches from responsibility on the drafts.

It is decreed that the judgment of the District Court be annulled, avoided and reversed; it is further decreed that the case be dismissed as of nonsuit; it is further decreed that plaintiff pay the costs of suit in both Courts.

#### 6828.—AUGUSTE PROVOSTY, Syndic, v. JAMES M. PUTNAM.

In an action of damages plaintiff must put defendant in default before he can recover. In commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party wishing to put the other in default, must, at the time and place expressed, or implied, by the agreement, offer or perform, as the contract requires, that which, on his part, was to be done, or the other party will not be legally put in default.

As a prerequisite to recovery of damages for violations of a commutative contract, the defendant must have been put in default.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J. Clarke & Bayne*, for plaintiff and appellant. *Lacy and Sperring*, for defendant and appellee.

This case was tried by a jury in the lower Court.

ILLSLEY, J. This action, founded on Article 2589 of the Louisiana Code, is brought to recover from the defendant, the difference in the price of a certain plantation, etc., which had been adjudicated to him at a syndic's sale; and which, in consequence of his refusal to comply with the terms of the first sale, was sold a second time for a less price.

The property advertised for sale and adjudicated, was a large sugar plantation, "*with good seed-cane to plant two hundred arpents.*"

The answer is a general denial, and, also, a special defense is set up, the principal ground of which is, that at the time of the sale, there was not on the property sufficient seed-cane to plant sixty arpents, and that

he was deceived, and led into error in this particular, by the advertisement, and that he was under no obligation to accept the adjudication made to him by the sheriff. He claimed damages in reconvention, but this he afterwards abandoned.

The case was submitted to a jury, and a judgment was rendered by the Court below, upon their verdict in favor of the defendant, and the plaintiff, after an ineffectual attempt to obtain a new trial, has appealed.

The appellant has filed in this Court his written argument; but none has been presented to us on behalf of the appellee.

The law gives three remedies against the defaulting purchaser, at auction sales—the action for the specific performance; the ordinary action for damages, and the action based upon the *folle-enchère*, which, itself, if properly conducted, liquidates the damages, and if the plaintiff could not have maintained his action in one of the two modes first mentioned, he must fail in this one.

Assuming as true, what is otherwise satisfactorily proved, that there was as great a deficiency of plant-cane, as is alleged in the answer, it follows that the vendor was not in a condition to comply with this very important part of his contract—to deliver to the purchaser, with the plantation, sufficient seed-cane to plant 200 arpents, and this was the obligation imposed on him by his contract, and by law. Art. 2450 C. C.

This is an action for damages, and as a prerequisite to their recovery, the defendant must have been put in default, which has not yet occurred. "In commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default, must, at the time and place expressed in, or implied by the agreement, offer, or perform, *as the contract requires, that which on his part was to be performed, or the other party will not be legally put in default.*" See Article La. Code 1908; 3 La. 382; 15 La. 282; 5 A. 578.

Whatever was the defendant's motive in bidding upon the property, he could still claim legally, as a purchaser, the full benefit of his contract, which was an entire one, and entitled him to what he bought, and every part of it. 6 La. 485. Nor was he compelled to perform his part of the contract as purchaser, until the seller showed his readiness and ability to perform his. 15 La. 282.

A sufficiency of good seed-cane is the life of a sugar plantation, and the quantity advertised and adjudicated with it to the defendant, formed so important an item in the sale, that persons present thereat say, that had it been made known how great was the deficiency (a fact not brought home to the defendant) they would not, although otherwise disposed to buy, have made a bid upon it. Seed-cane that year was very scarce, and the removal of it from one plantation to another, always injures it. None was put upon the place to supply the deficiency, and it is not, therefore, necessary to determine whether that would have been a compliance with the contract, on the part of the vendor.

The case of *Hall et al. syndics v. Nevill*, and Article 2487 La. Code, cited by the appellee, have no application to the present case.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.



## 722.—ROTH &amp; DEBLIEUX v. HENRY E. MOORE.

A commercial partnership being plaintiffs in a suit, and a commission to take testimony issuing after the death of one member of the partnership, and before his representatives had been made parties to the suit: *Held*—That the testimony should be admitted; the representatives alone have the right to object.

Defendant being proven to have been a partner in the transactions forming the basis of the suit, and the goods having inured to the benefit of that partnership, he is liable, notwithstanding that the credit had been given to the other party, individually, who had made settlement by giving his separate note for the balance due.

**A** PPEAL from the District Court, Parish of Iberville, *Posey, J.*  
*Samuel Matthews*, for plaintiffs and appellees. *Barrow & Pope*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiffs allege that the defendant and John W. Combs, a resident of the State of Kentucky, were commercial partners, trading in slaves, horses and mules, in the year 1857 and 1858. That during that period, they furnished Moore and Combs merchandise of various kinds, needed and suitable for their business. A running account is shown extending from July, 1857, to the middle of April, 1858, amounting to \$2,586 06, reduced by credits to \$596 06, the balance for which, with five per cent. interest from the 15th of April, 1858, this suit is brought.

The answer is a general denial.

Plaintiffs had judgment, and defendants appealed.

A bill of exceptions was taken to the admission of the testimony of Fleetwood, a witness, on the ground that before the commission issued, under which the evidence was taken, Roth, one of the plaintiffs, had died, and his widow and his heirs made parties after the commission issued, all the parties to the suit were not before the Court, when the commission was taken out.

The Court *a quo*, we think, properly overruled the exception, for the reason that the defendant had been served with a copy of the interrogatories, and, besides, that the irregularity objected to, could only be urged by the widow and legal representatives of the deceased plaintiff.

It appears that, on the books of Roth & Deblieux, the account sued upon was kept against Combs alone, and it is shown that a note was given by Combs to the firm of Roth & Deblieux, on the 3d of June, 1858, for six hundred and fifty-two dollars and eighty-six cents, with interest from the 1st of April, 1858. This note, it is admitted by plaintiff, was taken in liquidation of the account sued upon. A witness, who had been a clerk in the store of the plaintiff, testifies that they had on their books an account of eight dollars charged to Moore & Combs, and that this account was carried into the account of J. W. Combs. Two other mercantile establishments in Plaquemine charged goods to Combs & Moore. It is argued that these facts show the dealings of Roth & Deblieux to have been with J. W. Combs alone, and that they accepted his separate note in payment of those dealings.

Against this view of the case the evidence, in behalf of the plaintiffs, leaves no reasonable doubt that the goods furnished by them, inured to the benefit of the partnership of Moore & Combs.

The note for \$652 86 was deposited in the Court.

Roth &amp; Deblieux v. Moore.

The existence of the partnership is proved beyond a doubt. The personal responsibility of the defendant, for the partnership engagements, follows as a legal consequence.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

LABAUVE, J. recused.

NO. 1159.—RAYMOND P. GAILLARD *c.* HIS CREDITORS.

A syndic's commissions are limited to five per cent. on the net amount of money received by him.

**A** PPEAL from the District Court, Parish of Lafourche, *Gates, J.*  
*Burginiere & Blake*, for plaintiff and appellee. *Bush & Goode*, for appellants.

TALIAFERRO, J. By the proces-verbal of the notary, who presided at the meeting of the creditors, on the 16th day of October, 1866, it appears that, after the vote was taken for syndic, it was found that R. P. Gaillard, the insolvent, had received votes representing \$44,867 68, and that Louis Bush had received votes representing \$30,255 35. The majority in amount decided that Gaillard, declared to be chosen syndic, should be required to give security for his administration, and that he be allowed a commission of ten per cent. up to twenty thousand dollars, and five per cent. over that amount. When the proceedings were returned to the District Court, their homologation was opposed by several of the creditors, for various reasons, but chiefly on the ground, as alleged, that by the legal votes cast at the meeting of the creditors, Mr. Bush was elected syndic, and that the allowance of ten per cent. commission to the syndic is unauthorized by law.

The opposition was overruled by the Court below, and a judgment rendered homologating the proceedings. Two of the opponents have appealed.

1. As to the choice of a syndic, we do not find that the opponents have been successful in rebutting the evidence adduced by the creditors whose claims are opposed, except, perhaps, in one instance. The claim of Jules Labatut & Co., put down at \$16,550, is predicated upon ten promissory notes of \$1,355 each, dated March 8th, 1866, payable in annual gradation from one to ten years, without interest. It is apparent, upon the face of these notes, that their aggregate sum is \$13,550, instead of \$16,550, showing an over estimate of \$3,000. The opponents contend that these obligations, some of which are due, should be reduced by a discount at the highest rate of conventional interest, in conformity with the provisions of Art. 2049 of the Civil Code. Reducing, then, the aggregate sum of the notes by the discount claimed, and adding to the discount the over estimate of \$3,000, we have \$8,231 to be taken from \$16,550, the amount erroneously represented by the vote on Labatut's claim. But, finding no valid reasons for rejecting or reducing any of the other claims opposed, the net aggregate amount, represented by the vote of Mr. Gaillard, will still largely exceed the amount represented by the vote of Mr. Bush.

Gaillard v. His Creditors.

Next, as to the commission of ten per cent. allowed the syndic by the majority of the creditors in amount, we find that the law limits the amount of the syndic's commissions to five per cent. on the net amount of money received. The commission in this case being fixed at ten per cent. by the deliberations of the creditors, we think the proceeding illegal.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be amended, so as to accord to the syndic five per cent. on the amount of money received by him, and that the judgment in all other respects be affirmed. It is further ordered, that defendants and appellees pay costs of this appeal, and that opponents pay costs in the Court below.

## No. 1171.—L. LACROIX v. G. W. BANGS.

A suit having been dismissed, cannot be reinstated on the docket by an order granted *ex parte*.

**A**PPPEAL from the District Court, Parish of Lafourche, *Gates, J.*  
*R. D. Jordon*, for plaintiff and appellee. *Bush & Goode* for defendant and appellee.

**HOWELL, J.** On 3d March, 1865, the plaintiff instituted this suit to recover a sum of money loaned to defendant, who, on 16th October following, filed an answer admitting that he had borrowed, and still owed the money, but alleging that it was placed in the hands of one P. E. Michel, to pay for cotton purchased of him, called said Michel in warranty. Michel was cited as warrantor, but made no appearance.

On the 8th June, 1866, the following entry was made on the minutes of the Court: "The plaintiff being called at court-house door to come forward and prosecute his case, and not answering, this case was dismissed at his costs." The record does not show that the case was regularly fixed for trial, nor on whose motion it was dismissed. On the next day (June 9th) the order of dismissal was rescinded, and the case reinstated on the simple motion of plaintiff, without notice to defendant or warrantor. On 26th same month, default was entered against the warrantor, on whose motion does not appear. On 6th July following, the case was fixed for trial *instantly*, judgment was rendered against defendant, Bangs, on his answer, for the sum claimed, and on the evidence adduced the default was confirmed, and judgment for the same amount rendered against Michel as warrantor, and in favor of defendant, which judgment is to accrue to the benefit of plaintiff.

The judgment was signed on the same day, and notice thereof served on Michel, warrantor, on the 13th July, seven days afterwards, from which he alone appeals, and claims its reversal on two grounds, one of which we consider sufficient, to wit: the irregularities apparent on the record. He contends, and we think correctly, that after the dismissal of the case, whether regular or not, it could not be reinstated, if at all, without notice, and that the proceedings, after such dismissal, are *ex parte* and illegal.

Lacroix v. Bangs.

When this suit was dismissed, there was nothing before the Court, and whether the judgment should be considered as one simply of nonsuit or not, the action of the Court could not be reversed, and the case reinstated without notice, in some form to the opposite party, of the proceeding by which it was reinstated on the docket.

The defendant does not complain of the judgment against him. He and plaintiff are before us as appellees, and the latter urges the affirmance of the judgment against the warrantor.

It is therefore ordered, that the judgment against P. E. Michel, warrantor, be reversed, and the proceedings as to him dismissed; the costs in the lower Court and the costs in warranty to be paid by defendant, and costs of appeal be paid by appellee.

No. 1240.—NEW ORLEANS MUTUAL INSURANCE COMPANY v. WILLIAM BAGLEY.

A mortgage debtor may legally renounce the benefit of appraisement in the proceedings to sell on executory process, and will not be afterwards allowed to attack the sale as invalid.

The statute of March, 1866, requiring that all property sold under execution should bring its full appraisement, does not deprive the debtor of the right to make a waiver of the benefit of appraisement.

**A** PPEAL from the District Court, Parish of St. Tammany, *Ellis, J.*

*Alfred Hennen*, for plaintiff and appellant. *G. H. Penn*, for defendant and appellee.

**HOWELL, J.** The only question presented in this appeal is, whether the clause in the act of mortgage, dispensing with the appraisement of the property mortgaged, is valid in law?

This point was presented in the case of *Broadwell v. Rodriguez*, reported in 18 An. p. 68, and after full discussion by counsel, and mature deliberation by the Court, it was held that such a clause was legal and valid; and we find nothing in the circumstances of this case, or the able argument of counsel, to cause us to change our opinion, or relieve the case from the application of the principle there enunciated.

If the contract was legal at its execution, the subsequent change in the solvent condition of the obligor cannot impair its legality, and the fact that the Legislature, in March, 1866, enacted that property should bring its full appraisement, does not affect the principle on which the above decision was based. We may, indeed, presume that the Legislature, in the adoption of said statute, subsequent to the decision in *Broadwell v. Rodriguez*, recognized the construction placed upon the nature of such laws by this Court, as the right to make a waiver of appraisement was not prohibited.

It is therefore ordered, that the decree of the lower Court, ordering the mortgaged premises to be sold with appraisement, be reversed; and it is now ordered, that the said property be sold without appraisement, and in other respects, the judgment appealed from be undisturbed; defendant to pay costs in both courts.

No. 706.—S. P. GREVES, Testamentary Executor, *v.* TOMLINSON & SON and  
H. V. BABIN.

To bind the endorser on a promissory note, notice of demand or non payment must be shown. Notice left at the bank where the note is made payable is not notice to the endorser, unless it is shown that it reached him in a reasonable time, or an effort made to serve it on him.

**A** PPEAL from the District Court, Parish of East Baton Rouge, *Posey, J.*  
*S. P. Greves*, for plaintiff and appellant. *Dunn & Herron*, for  
defendant and appellee.

HOWELL, J. The sole issue involved in this controversy, is the liability of H. V. Babin, as endorser on a promissory note, which was protested at its maturity, on 21st February, 1863, after demand of payment at the Branch of the Louisiana State Bank at Baton Rouge. but of which the endorser denies having received notice.

It is shown that Babin resided, during the year 1863, some twelve miles from the town of Baton Rouge, outside of the military lines of the Federal forces, then occupying the town ; but that he was seen occasionally in the town, and resumed his residence there in February, 1864. No notice of demand or non-payment is shown to have been given, until service of citation in this suit, on 3d June, 1865. Notice left at the bank where the note was payable, is not notice to the endorser, as it is not shown to have reached him, and no effort made to serve it.

Judgment affirmed.

No. 916.—THE STATE *v.* PEIRCE et als.

Where more than one year intervenes between the commission of the offense (willful murder, arson, robbery and counterfeiting excepted), and the finding of the grand jury, the facts which interrupt prescription must be set forth in the indictment, otherwise the prosecution must fail.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J.*  
*R. W. Knickerbocker*, District Attorney, for the State. *J. H. Muse*,  
for defendants and appellees.

HOWELL, J. On 25th January, 1866, the appellees were indicted by the grand jury for the parish of East Feliciana for larceny, charged to have been committed on 20th July, 1862. They severally pleaded the prescription of one year, in bar of the prosecution, which was sustained, and the State appealed.

In the cases of the *State v. Foster*, 7 A. 256, and the *State v. Freeman et al.*, 17 A. 69, it was held that when more than one year intervenes between the commission of the offense (willful murder, arson, robbery and counterfeiting excepted), and the finding of the grand jury, the facts which suspend or interrupt the prescription must be set forth in the indictment, otherwise the prosecution cannot be maintained. The indictment in this case is defective, in this respect, and the facts necessary to take the case out of the statute of limitations could not be proven, and, consequently, the plea was well made.

Judgment affirmed.



## No. 6807.—C. A. &amp; J. S. MERRITT v. WRIGHT, WILLIAMS &amp; CO.

If an agent exceed his powers, and loss ensue therefrom, it will fall on him, unless the principal subsequently ratify, and recognize his departure from the letter of his instructions.

A party cannot avail himself of his own letters, as evidence, unless the letters have been called for by the opposite party to establish some fact against him.

A fortiori, their contents cannot be proved by parol.

The testimony shows that Downing, a merchant in Vicksburg, received from plaintiffs a draft on defendants, Wright, Williams & Co., of New Orleans, and forwarded it to them with a letter written by himself; that he copied the letter into his letter-book, and, subsequently, sent the letter-book to defendants, and they are now in possession of the letter, and the letter-book, and have failed to produce them on demand: *Held*—That on a foundation thus broad, the plaintiffs are entitled to prove the contents of the missing letter by parol, and in connection therewith to show the copy from the letter-book.

**A**PPPEAL from the Third District Court of New Orleans, *Ducigneaud, J.* *B. S. Tappan* and *Breaux & Fenner*, for plaintiffs and appellees. *Clarke & Bayne*, for defendants and appellants.

**TALIAFERRO, J.** In this case, Wright Williams & Co. are sued for \$750, the amount of a draft drawn upon them in March, 1853, by Sarah Miller, in favor of the plaintiffs.

The defense is, that defendants received the draft in the course of business, from R. N. Downing, of Vicksburg, Mississippi, the holder, under the blank endorsement of plaintiff, and with instructions from Downing to place the proceeds to his credit; which was done.

R. N. Downing in 1853, was a merchant of Vicksburg, having extensive business transactions with Wright, Williams & Co., of New Orleans. He had a large running account with them; was in the habit of drawing bills upon them, and of shipping cotton, and remitting bills, etc., to them to stand to his credit. The plaintiffs, who had no business transactions with the defendants, received the draft in question from Sarah Miller, whose factors the defendants were at that time. About the 22d of March, 1853, plaintiffs delivered the draft to Oliver H. Perry, the book-keeper of Downing, requesting Perry to send the draft to Wright, Williams & Co., with instructions to hold the proceeds to their order. Perry handed over the draft to Downing, who, it seems, enclosed it to Wright, Williams & Co., on the 29th of March.

It will be proper here to notice two bills of exceptions taken by the defendants in the course of the trial. In the first, they allege the incompetency of Perry, as a witness, on the ground of his liability to the plaintiff, arising from his having transcended his agency by delivering the draft to Downing for transmission, when, by the express terms of the agency, he could only execute that trust himself.

This objection would have much force, if the subsequent course of the plaintiffs did not amount to an approval of the act. The doctrine is that, "if an agent exceed his powers, and any loss ensue, that loss will fall on him. However, if his principal subsequently recognize his departure from the letter of his instructions he is exonerated; for *omnis ratihabitio retro trahitur et mandato priori æquiparatur*. And such a recognition may be inferred from the employer's conduct. Smith's Mercantile law, page 147. Story on Agency, page 283, § 253. Greenleaf on Evidence, vol. 2, § 67.

We find that the plaintiffs, in this case, when they ascertained that the proceeds of their draft had been misappropriated, wrote from Tennessee, two letters to Downing, one in June, the other in July of the same year, urging him to pay them the amount of the draft, as they were much in need of money. Downing died in the month of September following, leaving his estate insolvent. In June, 1856, nearly three years after, the plaintiffs instituted the present suit against Wright, Williams & Co. We conclude, from these facts, that the plaintiffs ratified the act of their agent, and exonerated him. The exception was therefore properly overruled.

The second bill of exceptions is to the exclusion, by the Court, of various statements of the witness, Outlaw, in regard to the contents of certain letters, and the opinion of the witness touching their import, etc. When this testimony was offered, and objected to as secondary, inasmuch as it refers to letters which are in writing, the defendants thereupon offered to produce from their letter-book copies of certain letters referred to in the testimony of the witness, as soon as the letters could be procured from their counting-house. It was further objected, that the defendants could not use their own letters to make evidence in their own behalf.

The Court states its reasons for sustaining the objections to be, that the testimony is illegal, and that no letters were before the Court.

We think the exception was correctly sustained. The defendants could not avail themselves of their own letters as evidence, unless the letters had been called for by plaintiffs, to establish some fact against them. 1st Greenleaf, § 563. *A fortiori*, they could not prove their contents by parol. It is also apparent from the record, that the matters sought to be proved by the testimony offered are foreign to the issues raised by the pleadings.

On the trial of the case, the plaintiffs took orders *subpoena duces tecum* against defendants to produce the letters to them from Downing under date of March 29th, 1853, in which the draft was enclosed, and, also, to produce the letter-book of Downing, which they supposed to be in defendants' possession. The defendants answered that no such letter as the one called for could be found, and that the letter-book of Downing was not in their possession. The testimony of Outlaw, a witness on the part of defendants, and a clerk at the time in the house of Wright, Williams & Co., is full in regard to the letter. Upon his examination-in-chief he said: "I have looked carefully for any letter from Downing, enclosing the draft referred to, and do not find any. The draft may have been delivered personally, or have been enclosed in a letter. I see by my own entries, that it was placed at the time stated to the credit of Downing." Upon cross-examination he said: "I saw the letter from Downing, which enclosed the draft described in my previous evidence. I do not recollect the language of that letter; it is too long a time; it was in 1853. I do not recollect its purport. I have looked for this letter since I have been in the city this trip, but I could not find it. It is usual for defendants to keep such letters, but some how or other it has been taken away." In relation to Downing's business, the witness said: "Downing was always largely a debtor in account with defendants; he was always largely indebted to defendants, and is still indebted to them. Downing died a bankrupt."

The witness, Perry, was twice examined in the progress of this case;

first in January, 1857, under commission; and afterwards, in March, 1859, his deposition was taken in New Orleans by consent. Upon his first examination, he said he had access to Downing's letter-book, and he annexed to one of his answers a copy of the letter of March 29th, 1853, in which the draft was transmitted by Downing to the defendants. At the last examination, he stated that he had then recently endeavored at Vicksburg to get the letter-book of Downing, but was informed by the head clerk of the house of Allen, Wright & Co., that it had been sent to Wright, Allen & Co. of New Orleans. The letter is of considerable length, embracing various business matters, and the concluding paragraph relates to the draft as follows: "I was not aware of any draft in our possession drawn by S. Miller, until the reception of your letter, when I was informed by Mr. Perry, my book-keeper, that it was account C. A. & J. S. Merritt, and that he had enclosed the letter of advice in mine of the 22d inst. The draft he did not send, as it was not endorsed. I enclose the same to you now, and if paid, to credit of the Merritts, who will draw on you for same. The drawer is a widow lady, living near Lake Providence, and was drawn here by her son, who stated the funds were in your hands.

Yours truly, R. N. DOWNING."

The introduction of this sworn copy from the letter-book of Downing was objected to on the ground that being a copy of a copy, it was inadmissible. Further objections were made to the statements of the witness as to the instructions given by Downing to Wright, Williams & Co., as these instructions were in writing. It is seen that plaintiffs called for the production of the original letter of Downing, in which the draft was sent, a letter which it is clearly proved was in the possession of the defendants, and they failed to produce it or account for its disappearance. It is also seen that efforts were made to produce the letter-book of Downing, but without effect. Upon a foundation thus broad, we think the plaintiffs had the right to prove by parol the contents of the necessary letter, and in connection with it to show the sworn copy taken from the letter-book. The witness swears directly, that the letter of the 29th of March, contained the instructions to defendants to place the proceeds of the draft to the credit of the Merritts; and that the copy of that letter in the letter-book showed the original to have been written by Downing, with whose handwriting the witness was well acquainted.

Without the preparatory steps necessary to enable the plaintiffs to prove the contents of the letter by parol, the testimony of the witness that he delivered the draft to Downing, with instructions to advise the defendants to place the proceeds to the credit of the plaintiffs, would raise the presumption that Downing had complied with these instructions. The evidence adduced leaves no doubt that he did so.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

No. 1249.—ELIZA B. BOGAN, Wife of JAMES BOGAN, *c.* A. C. FINLAY et al.

It devolves on the party objecting to testimony to state the particular grounds upon which its introduction is resisted.

All corporeal movables may pass by manual gift, accompanied by real delivery.

Where a judgment of separation of property between the husband and wife is made the basis of an injunction suit by the wife, the judgment is admissible in evidence to prove *non ipso*; but, where the defendants in their answer attack the validity of the judgment, as fraudulent and collusive, it will produce no legal effect unless its genuineness is established by other legal evidence.

**A**PPEAL from the District Court, Parish of East Feliciana, *Posey, J.* *Brief of S. P. Greves, for plaintiff and appellant.*—This is an injunction suit, in which the plaintiff and appellant sets forth that, in suit No. 617 of the docket of the Fifth District Court for East Baton Rouge, entitled *Eliza B. Skolfield, wife, v. James Bogan, husband*, she was separated in property from her said husband, and decreed to own, as her separate and paraphernal property, a certain bay horse, buggy and harness; and that, since said judgment, she has been in possession of said property.

The petition further sets forth that, in suit No. 455, entitled *A. C. Finlay et al. v. James Bogan*, said buggy, horse and harness have been seized and advertised to be sold as the property of James Bogan, notwithstanding her ownership and possession of the same by decree of Court.

Further prays that the sheriff be restrained by injunction from selling said property, until the question of title should be decided by the Court.

The answer of defendants, to the petition in injunction, alleges that the judgment rendered in suit No. 617 is not valid; charges collusion and fraud upon Bogan and his wife in procuring said judgment, for the purpose of defeating the claim of the plaintiffs in suit No. 455; that the property, of which the sale is enjoined, belonged to the husband, and that the wife brought no property into the marriage.

On these grounds they pray for the dissolution of the injunction, and upon these pleadings the parties went into trial.

The plaintiff in injunction offered in evidence the judgment in suit No. 617, decreeing the horse and buggy in controversy to be the separate property of petitioner. Objection having been made by counsel for defendants, the Court refused to receive the judgment in evidence for any purpose. Whereupon the counsel for plaintiff reserved his bill of exceptions to the ruling of the Court.

In this bill of exceptions, the Court admits that the judgment offered in evidence was ostensibly valid.

Now, the decree and proceedings in suit No. 617 being the basis of the suit for injunction, and said decree having been attacked in the answer as fraudulent and collusive, the judgment and proceedings should have been allowed in evidence, not as conclusive against the defendants in injunction, but to show that such a judgment existed, what that judgment decreed, and the proceedings under it, in order to refute affirmatively the allegation of the answer, and that the Court might determine whether the judgment, independent of the question of the property in the horse and buggy enjoined, was valid and in effect dissolved the community, which

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question had been put at issue in the answer, and which it was the right of the plaintiff to have finally adjudicated upon.

As the matter stands, the judgment of separation of property is admitted to be valid on its face, leaving the question of the property of the horse, buggy and harness to be proven *aliunde* the record, which plaintiff endeavored to do by offering in evidence, as proof of a manual gift or donation, the letter of J. B. Gribble, accompanying the delivery of the buggy and harness to the plaintiff.

The grounds on which the Court rejected the evidence were, that the gift was not a manual one, in the sense of Art. 1526 C. C.

If the construction of that article by the lower Court be true, then the gift of affection from an old family friend to the plaintiff must be defeated in its object, and go to the grasping creditors of the husband.

This Court, in *Maillet v. Wesley*, 11 An. 467, has placed a liberal and sensible construction upon this article of the Code.

In that decision, household furniture is treated as corporeal movables, and the donation of them may be proved by parol.

If a solemn notarial act may be dispensed with in the donation of household furniture, must a man go before a notary public to make a valid donation of a buggy and harness?

If this Court should overrule the decision in *Maillet v. Wesley*, it certainly should not be at the expense of the plaintiff, who had the right to consider the construction of Art. 1526, by this Court, as the law, in accepting the gift without the solemnity of a notarial act. If there be any doubt, we should have the benefit of that doubt, and the buggy and harness decreed to be our property. At all events, the decision of the lower Court should be reversed, and the judgment in suit 617 admitted in evidence, to prove the allegation of the petition, and to disprove the allegations of the answer going to annul its provisions.

*Brief of Joseph Joor, for defendants and appellees.*—Eliza B. Bogan, wife of James Bogan, sued out an injunction to stop the sale of a buggy, harness and horse, stated to be worth the sum of \$500, on the ground that they were her separate property. Defendants had seized them as the property of her husband. She claimed that this property was hers by donation from John B. Gribble.

Defendants alleged the property to belong to the community, and charged fraud and collusion between husband and wife, and prayed for damages.

Judgment was rendered against plaintiff, and allowing fifty dollars damages. Plaintiff appealed.

The only matter before the Court is two bills of exceptions taken by plaintiff.

1. Plaintiff offered a letter of Gribble to prove a donation of buggy and harness. Defendants objected.

C. C. 1453: "Property can neither be acquired nor disposed of gratuitously, unless by donations *inter vivos* or *mortis causa*, made in the forms hereafter established."

C. C. 1525: "A donation *inter vivos*, even of movable effects, will not be valid unless an act be passed of the same, as is before prescribed."

But plaintiff now pretends that it was a manual gift. How could this



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be, when it is said to be done by letter? Mrs. Bogan lived in Baton Rouge, and Gribble in New Orleans. If it was a manual gift no letter between parties one hundred miles apart was needed; neither could it effect a "real delivery," as required by Art. C. C. 1526. A watch, a sum of money—anything that could be taken in the hand and "really delivered," would be a proper subject for a manual gift. Is a buggy susceptible of such delivery, in these days when giants are not to be found?

2. A letter of a third person is merely an assertion, and cannot be received against these defendants. If Gribble made this donation by "real delivery," his evidence should have been taken under oath. The law presumes all property in possession of husband and wife to be community, until the contrary is shown. C. C. 2374. This property was found in possession of the husband. \* \* \*

The second bill is to the rejection of the judgment of *Eliza Bogan, wife, v. James Bogan, husband*. This was proper. In *Dunn v. Woodward*, 11 An. 267, this Court says: "Under the issue, it is clear that the appellant was bound to prove the genuineness of her claim against her husband for her dotal and extra-dotal rights, which constituted the alleged consideration of the transfer to her. The judgment of separation could have no more effect against the creditors of the husband, than the pretended agreement itself. 8 N. S. 460. 4 L. 420. In the absence of any such proof on her part, we take it to be clear, that the pretended conveyance to her must be regarded as a mere simulation."

LSLEY, J. The defendants in this injunction suit, having seized, as the property of James Bogan, a horse, buggy and harness, his wife, Mrs. Eliza B. Rogan, sued out an injunction to stop the judicial sale thereof, alleging, in her petition, that she was the owner of the property seized, having acquired it by a manual gift from one John C. Gribble. The defendants, in their answer, say that the said property belongs to the community between James Bogan and his wife, and it charges the spouses with fraud and collusion, and prays for damages.

The injunction was dissolved, with damages, and the plaintiff, Mrs. Bogan, has appealed from the judgment in the Court below.

During the trial of the case in the District Court, the plaintiff offered certain evidence, which was rejected; and to the ruling of the Court, in this particular, she tendered two bills of exception, which were allowed. The first bill was to the refusal of the Court to receive as evidence a letter, purporting to be signed by John C. Gribble, to prove by it that the horse, buggy and harness were a manual gift to Mrs. Bogan, from John C. Gribble, accompanied with delivery, and this was objected to, on the ground that the pretended gift was not a manual one, in the sense of Art. 1526 of the Civil Code, and could not be proved by the letter offered. It devolves on the party objecting to testimony, to state the particular grounds upon which its introduction is resisted (see 1 Hen. Dig. 492, § 1); and the only reason assigned for the rejection of the letter as evidence being the one just stated above, the Court below erred in rejecting it, as in the case of *Mauillot v. Wesley*, 11 An. 467, it was held, in effect, that corporeal movables generally may pass by manual gift, accompanied by real delivery.

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The other bill was taken to the refusal of the Court to receive, as evidence for the plaintiff, the judgment in the suit No. 617, of the records of the District Court, entitled *Eliza B. Skofield, wife, v. James Bogan, husband*, and referred to, in her petition for injunction, as the basis of her claim to the horse, buggy and harness, as her separate property; and this evidence was objected to on the ground that the defendants, having attacked the validity of this judgment in their answer, as fraudulent and collusive, the said judgment could not be produced in evidence, as proof that the horse, etc., were the separate property of the plaintiff, unless she proved the facts, upon which the said judgment was based, are true, contradictorily with the defendants. The evidence was admissible to prove, *rem ipsam*, that such a judgment was rendered, and as a mere basis of title in the plaintiff, but which could produce no legal effect under the pleadings, unless its truth and genuineness were established by other legal evidence.

This is not an open question. 4 La. 422. 12 La. 304. 11 La. 536. 4 An. 135. 10 An. 87.

As neither the letter nor the judgment was annexed to the bill of exceptions, the case is not in a condition, in this Court, to be finally disposed of, and it must, therefore, be remanded for a new trial.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, that the case be remanded to the District Court, for a new trial according to law, at the costs of the appellee.

No. 1158.—SUCCESSION OF EDWARD ROBSON—JOACHIN BADEAUX, Administrator v. HEIRS AND CREDITORS.

An administrator can pay the debts of the succession only upon the authorization of the Court—the balance in his hands, after paying the debts, must be paid over to the heirs, or their legal representatives, by order of the Court. If he pays without such authorization, he does so at his peril.

**A**PPEAL from the Third District Court, Parish of Lafourche, *Gates, J. Louis Bush*, for plaintiff. *Blake & Jordan*, for opponents.

HOWELL, J. This is an appeal by the administrator of this succession from a judgment sustaining an opposition to a provisional and a final tableau filed by him. He was appointed in January, 1859; on 4th May, 1866, he filed a provisional, and on 5th June following, a final tableau, both of which were approved by the natural tutrix, and widow in community, except one item, the sum of \$400, charged as paid on 12th July, 1860, to one J. C. Potts, for account of Mrs. Robson, the widow and opponent, and for which the administrator took, and retained until the trial of the opposition, on 22d December, 1866, a due bill from the said Potts in favor of Mrs. Robson, bearing eight per cent. interest from 1st April preceding its date.

This was clearly an unauthorized payment or disposal of the funds of the succession, and cannot be recognized as a charge against it. It is

not shown that the creditors or heirs have been benefited thereby, nor does it appear that the widow in community could, at that time, control this amount in the hands of the administrator. The assumption that this was a loan, which the widow and tutrix authorized the administrator to make of the funds of the succession, cannot be maintained. An administrator can pay the debts of the succession only upon the authorization of the Court, and any balance that may remain to the heirs or representatives. C. C. 1056, 1066. If he pays to either, without such authorization, he does so at his own risk.

The effort of the administrator, in this instance, to show a want of ratification on the part of the opponent of this transaction, does not succeed in relieving him. The evidence is vague and insufficient. We are of opinion that the lower Court did not err in sustaining the opposition to this charge in the administrator's account.

Judgment affirmed, with costs.

NO. 890.—J. N. DELEE *v.* MRS. MARY HATCHER.

Where a reconventional demand grows out of the plaintiff's cause of action, a verdict for one party is necessarily a verdict against the other.

**A**PPEAL from the District Court, Parish of East Feliciana, *Posey, J.* *W. F. Kernan*, for plaintiff and appellee. *Cross & Hardee*, for defendant and appellant.

**ILSLEY, J.** The plaintiff sues to recover from the defendant the sum of three hundred and twenty dollars, for building a cotton gin-house and press, on the plantation of the defendant.

The defense was, that the gin-house, etc., was so defectively constructed that it fell down on a calm day, in February, 1865, about two years after its completion; and that the material used in the said building was thereby destroyed, and was a loss to her.

She reconvened, and claimed damages to the amount of five hundred dollars for the loss of the material.

There was a trial by jury, and a verdict was rendered in favor of the defendant for one hundred and seventy-five dollars as damages, and from a judgment thereupon rendered the plaintiff has appealed. The verdict of the jury seems only to have responded to the reconventional demand, and not to the plaintiff's claim.

It has been held that, when the reconventional demand grows out of the plaintiff's cause of action, a verdict for one party is necessarily a verdict against the other. *Kelly v. Caldwell*, 4 La. 40. 6 An. 222. No objection is made in this case to the form of the verdict, and it is unnecessary, therefore, for us to say whether the same is or not defective.

A careful examination of the facts of the present controversy has satisfied us that it must be governed by Article 2733 of the Civil Code, which is a modification of Article 1792 of the Code Napoleon; and, referring to

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this last article, Marcadé considers it as much a matter of public order as of private interest; and it is for the undertaker, in the exercise of his art, to ascertain if the materials to be employed in a construction are suitable.

The badness of the workmanship comprehends not only a defect of construction, but, likewise, the using of bad materials, notwithstanding these materials be furnished by the proprietor, as it is the duty of the undertaker to reject them. Vol. 6, p. 536, Art. 1.

Applying Article 2733, as expounded by the erudite French commentator, to the facts of this case, as they were presented to the jury, and as they are extant upon the record, their verdict in favor of the defendant was certainly a correct one.

The plaintiff deems the amount of damages awarded excessive; but, as in this particular the verdict is not manifestly erroneous, and it has been sanctioned by the Judge a quo, we are not disposed to set it aside.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.

No. 1247.—BERNARD MARIGNY v. G. R. CARRADINE, Sheriff.

The police jury of the parish of St. Tammany are prohibited, by the charter, from imposing taxes on the town of Mandeville, in said parish.

**A** PPEAL from the District Court, Parish of St. Tammany, *Ellis, J.*

*Alfred Heanen*, for plaintiffs and appellants. *G. H. Penn*, for defendants and appellees.

LABAUVE, J. The substance of the petition is: Petitioner is a proprietor in the town of Mandeville, in said parish, and holding valuable real estate in said town; that by the act, § 6, incorporating said town, passed 24th March, 1840, land or taxable property situated in said town are exempt from parish taxes. That George Carradine, sheriff of said parish, demands of petitioner the payment of the parish taxes for the years 1862, 1863, 1864 and 1865, as will fully appear by the notice of said sheriff, annexed to the petition; that plaintiff has erroneously paid the taxes of 1862; that Carradine threatens to seize and sell the property of petitioner to pay said illegal taxes.

Petitioner prays that said George Carradine, sheriff, may be cited and enjoined from collecting from petitioner, any parish tax for said parish of St. Tammany.

The District Judge, after hearing the evidence, perpetuated his injunction as regards the parish tax of 1862, and dissolved it as to the balance. The plaintiff appealed.

This case involves a question of law: has the police jury of the parish of St. Tammany the right and power to impose parish taxes on property situated in the limits of the town of Mandeville, in that parish?

The 6th section of the act of incorporation of said town, reads as follows:

"Be it further enacted, etc., That all the powers devolved until this

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day upon the police jury of the parish of St. Tammany, so far only as the incorporated limits of said town, be, and they are hereby transferred to the town council of said town, except the imposing and collecting of the State taxes." Here this maxim, "*expressio unius est exclusio alterius*," must apply.

This action is clear, and leaves no room for interpretation. Civil Code Article 13. The Legislature had certainly the constitutional power to enact that clause in the charter of incorporation of this town, and no reason has been assigned why we should not give it full effect.

It is therefore ordered and decreed that the judgment appealed from be annulled and avoided, and that the injunction be perpetuated, and that the defendant, Carradine, sheriff, pay cost in both Courts.

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No. 1338.—P. A. KUGLER v. SEYMOUR TAYLOR.

Notice of the transfer of an instrument, not negotiable, cannot defeat any equity or offset in the hands of a debtor, at the time of receiving the notice.

The plaintiff, being a third party, holding a receipt not negotiable, possesses no greater rights than the party to whom the receipt was given.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J. John McVea, and Burgess and Chamey*, for plaintiff and appellant. *Cross & Hardee*, for defendant and appellee.

**HOWELL, J.** This suit is brought on the following instrument: "Received, East Feliciana, La., November 15, 1862, of Jules Bonnacage, agent of P. Machet, of Baton Rouge, the sum of five thousand dollars, in current funds, in full of fifty bales cotton, weighing twenty-five thousand pounds, being an average of four hundred pounds per bale, and twenty-five cents per pound. The cotton to remain on premises protected from the weather until delivered. (Signed) SEYMOUR TAYLOR."

Plaintiff prays for the delivery of the cotton, or the payment of said sum of \$5,000.

The defense is that no part of said sum was paid, but that defendant sold to Bonnacage, agent, one-fourth of his cotton to be paid for when the same could be moved to market—the object being to place the whole of the cotton in the name of a foreigner, and under the protection of a foreign government during the war, as is shown by a counter-letter of same date, with the receipt; that no part of the price of said fourth has been paid, and that the plaintiff is not the real owner of the receipt sued on, which is not negotiable, but is held by plaintiff to defeat the equities between the contracting parties.

The case was tried before a jury, and a verdict and judgment being rendered against plaintiff, he has appealed.

Our attention is directed to several bills of exceptions to the admission of the counter-letter, and other evidence, to establish the defense set up as against the plaintiff, an innocent third holder, and to the refusal of the judge *a quo* to charge the jury, that the plaintiff, being a third party, is not bound by the equities between the original parties, and that when



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defendant was notified that plaintiff was the holder of the receipt sued on, it was his duty to give notice of any existing equities.

The judge charged that "notice of the transfer of an instrument not negotiable, cannot defeat any equity or offset in the hands of the debtor at the time of receiving the notice."

We think the judge did not err. The instrument sued on is not negotiable, and the doctrine invoked by plaintiff cannot apply in this case. The plaintiff possesses no greater rights than the party to whom the receipt was given.

The evidence shows the transaction to be one which should not be enforced. 10 R. 521. 5 A. 235, 406, 410. *Gray v. Thomas, Griswold & Co.* 18 A. 412.

Judgment affirmed.

No. 1182.—ELIZABETH JORDAN, Wife of R. D. JORDAN, *v.* F. L. MEAD, Testamentary Executor, et al.

To the contract of lease three things are absolutely necessary : the thing, the price, and the consent.

The price should be certain and determinate. C. C. 260 and 261.

The mere occupancy of property does not necessarily imply the relation of lessor and lessee.

**A**PPEAL from the District Court, Parish of Terrebonne, *Gates, J.*  
R. D. Jordan and F. S. Goode, for plaintiff and appellant. *Winchester Hall*, for defendant and appellee.

HOWELL, J. On the 5th September, 1865, judgment was rendered upon two promissory notes, by the District Court in the parish of Terrebonne, against Washington Tanner, on his confession, in favor of F. L. Mead, testamentary executor; execution issued thereon, and certain movable property was seized on 10th of same month, and on 4th November was sold for the net amount of \$288 43. On 16th October, 1865, Mrs. Elizabeth Jordan, wife of R. D. Jordan, obtained judgment in the same Court against said Tanner, upon his confession, for \$750, for three years' rent of a tract of land, and the improvements thereon, with lessor's privilege upon all the movables on the premises occupied by him.

On the 18th October, 1865, this suit was instituted by the said Mrs. Jordan, separate in property from her husband, as a third opposition, claiming a superior privilege on the proceeds of the property sold under the *fiat facias*, issued on the judgment in favor of Mead, testamentary executor; the property thus sold being that alleged to be subject to the lessor's privilege, allowed in the judgment in favor of Mrs. Jordan.

The defense is a general denial, and a special denial that plaintiff is separate in property; that she is the owner of the property occupied by Tanner, or that any rent was due by him to plaintiff; and the averment, that the judgment for the alleged rent was obtained by consent, and for the purpose of defrauding Tanner's creditors.

Judgment was rendered in favor of defendant, and plaintiff appealed.

The only question, which it is important to determine, is whether or not the evidence establishes, as against the defendant in this action, the

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relation of landlord and tenant between Mrs. Jordan and Washington Tanner, so as to entitle the former to the privilege accorded by law to lessors.

The record and judgment in the suit for rent were introduced to prove *rem ipsam* only, and we can find no evidence in the record to prove a contract of lease. Admitting that the act of 1865 (No. 42, p. 80), amending Art. 2653, and declaring that "no lease of real estate shall be proved by parol," cannot be invoked in this case, and that parol evidence has been received without objection, such evidence does not establish a contract between the parties.

Article 2640 C. C. declares that, to the contract of lease, as to that of sale, "three things are *absolutely necessary*, to wit: the thing, the price, and the consent." The price should be certain and determinate, and it may be fixed by a third person named. Arts. 2341, 2342. Here no determinate price is shown. One witness says the premises are worth twenty or twenty-five dollars per month; two others say that they are worth \$250 *per annum*. No one says the occupant was to pay either or any sum. The acknowledgment of the occupant in the suit against him is not evidence against this defendant; and "the mere occupancy of property does not necessarily imply the relation of lessor and lessee, and thus give rise to the landlord's lien and privilege." 11 R. 280. 7 A. 654. 17 A. 22.

Judgment affirmed.

No. 708.—GEORGE W. CLARK v. GEORGE W. PRATT.

A writ of attachment will not be maintained, where the party left the State temporarily, on account of the political agitation prevailing here at the time, and it is not shown that he has established a domicile elsewhere.

**A**PPEAL from the District Court, Parish of East Baton Rouge, *Posey, J.* S. P. Greves, for plaintiff and appellant. R. W. Kuickerhocker, for defendant and appellee.

TALIAFERRO, J. The plaintiff, alleging the defendant to be indebted to him in the sum of twenty-five hundred dollars, on account of partnership transactions, in which he and defendant had been engaged several years ago in New Orleans, commenced this suit by attachment, regarding the defendant as a resident of the State of Illinois. Personal citation was also made upon the defendant, who was at the time of this proceeding in the parish of East Baton Rouge.

A motion was filed by defendant to dissolve and set aside the attachment, on the ground that the affidavit upon which it was founded is untrue, his residence being in New Orleans, and not in Illinois. The defendant also filed an exception to the jurisdiction of the Court, averring his domicile to be in New Orleans. The exception was sustained, and the attachment dissolved. The order sustaining the exception was rendered on the 17th July, 1865; that dismissing the attachment on the 15th of the same month. This appeal appears to have been taken from the last mentioned order. It is shown that the defendant left New Orleans in the

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summer of 1861 to avoid the political agitation then pending here, and removed to Illinois, where he resided several years; that he returned to New Orleans in 1864 and opened an office, expressing his intention to return here. He again went to Illinois, and remained there a period of eight months, and came again to Louisiana, and was engaged in trade at Baton Rouge. A witness states that defendant, shortly after going to Illinois in 1861, sold his property there in order to return to New Orleans; that he always spoke of New Orleans as his home; that his earlier return to New Orleans was prevented by obstacles arising from the war; that when he went to Baton Rouge it was on transient business. Another witness states that defendant paid office rent in New Orleans during his absence; that he left New Orleans in 1861 on account of his political sentiments, and the prejudice existing in New Orleans against persons of Northern birth; that he expressed his intention of returning to New Orleans. The evidence, on the part of the plaintiff is, that several judgments were rendered against the defendant at Champaigne, in a circuit court of Illinois; that he said his family was living at Champaigne, Illinois, and that he said he had been doing business at St. Joseph, Missouri. A witness said that in October or November, 1864, defendant told him he had a lot of whiskey in St. Joseph, which he intended to send to Clark to be credited to his account.

We conclude with the District Judge, that the facts proved show that during the defendant's absence from Louisiana, he was the greater part of the time on the wing; in Illinois, at Memphis, St. Louis and St. Joseph, and that he did not establish a domicile at any of these places; that he constantly evinced his intention to return to New Orleans; and that this fact, connected with others, make it sufficiently clear that his domicile was not changed by having gone to Illinois, and other places, and abiding there during the distracted condition of this country, consequent upon a state of war.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

No. 672.—HENRY L. WOLFE *v.* M. POIRIER, J. N. POIRIER and H. V. BABIN.

The Supreme Court will not dismiss an appeal on motion of appellant, without consent of appellee. It is not incumbent on plaintiff to prove the signatures of the drawer and first endorser of a promissory note, when defendant is a subsequent endorser: his transfer of the note by endorsement admitted the validity of his title.

**A** PPEAL from the District Court, Parish of East Baton Rouge, *Posey, J. A. Derussy*, for plaintiff and appellee. *R. W. Knickerbocker* and *J. M. McCutchen*, for defendant and appellant.

**LSLEY, J.** The appellant has moved to dismiss the appeal, on the ground that the debt sued for has been extinguished by the sale of the property of the drawer of the note sued on.

As the appellee has not consented to the dismissal or withdrawal by the

appellant, this Court cannot maintain the motion of the appellant, which is overruled. C. P. Art. 901.

On the trial of the case, the endorsement of the defendant upon the note was proved, but the signature of the drawer and the endorsement of the payee were not shown to be genuine. This was not necessary, as the defendant, by transferring the note by endorsement, admitted the validity of his title to it.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.

No. 1242.—SUCCESSION OF GEO. W. WATTERSTON, deceased—On rule taken by A. PENN AND D. N. HENNEN, Creditors—On ASHFORD ADDISON, Dative Testamentary Executor—to file a tableau of distribution, and increase the security on his official bond.

Where the account filed by the executor makes a *prima facie* showing that he has no funds on hand to distribute, and the contrary is not made to appear, the Court will not order him to file a tableau of distribution.

**A**PPEAL from the District Court, Parish of Livingston, *Ellis, J.* *Wilson & Pipkin*, for dative testamentary executor. *Racz, Foster & F. T. Merrick*, for appellee. *A. Hennen*, for Penn. *D. N. Hennen*, *pro se*.

**TALIAFERRO, J.** In May, 1866, under an order of Court previously rendered, the dative testamentary executor of Geo. W. Watterston, deceased, filed in the District Court of the parish of Livingston, an account or exhibit of the condition of the estate, and caused it to be advertised. In the month of August following, Penn & Hennen, two of the creditors of the estate, took a rule upon the executor to show cause why he should not file a tableau of distribution of the funds of the estate in his hands, and furnish additional security on his bond as executor.

In his answer to the rule the executor denies that the parties taking it are creditors of the estate: and, if creditors, that they have never presented their claims for approval or rejection. He, therefore, prayed that the rule be dismissed. In an amended answer he denied the allegations in the rule, that the sureties on his bond are insufficient. The objection, as to the sufficiency of the bond, seems afterwards to have been abandoned. On trial of the rule the judge of the District Court gave as reasons for dismissing it, that the account filed by the executor presented a *prima facie* showing that he had no funds in hand to distribute, and the contrary not being made to appear, he could not render an order for the filing of a tableau of distribution. From this judgment, discharging the rule, the plaintiffs in the rule have appealed.

It is proper here to notice that a motion was filed in this Court to dismiss the appeal; but we do not consider the grounds sufficient to enable us to sustain the motion.

It would seem to be a useless thing to order the executor to distribute

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funds, unless he has funds to distribute. The executor distinctly declares, by his account, that he has no funds. The simple issue of whether he has or not, is therefore made up between him and the plaintiffs, who assume that he has \$5,622 16, in cash, which he ought to distribute. This assumption is certainly not warranted, from an inspection of the account. The plaintiffs made no opposition to the account, which it would seem they are required to do, by Article 1004 of the Civil Code. This question of funds or no funds, should, we think, be settled by the trial of an opposition to the account.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, without prejudice to the plaintiffs' right, if any they have, to oppose the executor's account, the costs of this appeal to be sustained by the succession.

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No. 1195.—STATE OF LOUISIANA *v.* PERIQUE VEGAS.

The law prescribing the mode of drawing juries, directs that the list of jurors drawn for each term shall be filed in the clerk's office as soon as completed, subject to the inspection of any person who may desire to examine it; in order that any objections which might or could be made, on account of any defects or informalities which may have occurred in the formation, drawing or summoning of jurors, or any other defect whatsoever in the construction of the jury, shall be made on the first day of the term.

If the venire is not filed on or before the first day of the term, and the petit jury find a verdict of guilty, a new trial will be granted.

**A** PPEAL from the District Court, Parish of Assumption, *Beauruis, J.*  
*A. S. Herron*, Attorney General, for State. *Nicholls & LeBlanc*, for defendant and appellant.

**TALIAFERRO, J.** At the June term, 1866, of the District Court sitting in and for the parish of Assumption, the defendant was indicted and tried for the crime of murder. He was found guilty, without capital punishment. He moved in arrest of judgment and took an appeal. The grounds set up in defense, are:

1. That the venire has never been returned, and that that omission vitiates all the subsequent proceedings.
2. That the indictment is defective in not repeating the words "then and there," in its conclusion.
3. That no copy of the indictment was served upon the accused; and that he was not served with a copy of the jury list—the law entitling him to a copy of "a panel, duly certified by the sheriff."
4. That talesmen were appointed prior to the returning of the venire.
5. That the foreman of the petit jury was appointed by the judge.
6. That the verdict was not rendered in the English language.

The term of Court, at which the accused was tried, commenced on the 18th of June, 1866—the indictment was found on the 19th. The defendant was tried on the 27th, and sentenced on the 30th.

The law prescribing the mode of drawing juries, directs that the list of jurors drawn for each term shall be "filed in the clerk's office as soon as completed, subject to the inspection of any person who may desire to examine it." Revised Statutes, p. 295, § 3. It directs that "all or any



objections which might or could be made, on account of any defects or informality, which may have occurred either in the formation, drawing or summoning of jurors, or any other defect whatsoever, in the construction of said juries, shall be made on the first day of the terms of said District Court, and not afterwards." R. S. p. 296, § 3.

The venire in this case was filed on the 30th day of June—the day the defendant was sentenced, and two days after he was tried. It is plain that the laws quoted contemplate the filing of the venire in the clerk's office before the commencement of the term of Court, or, at the farthest, on the first day of the term, otherwise they would require an impossibility. We think the defendant entitled to a new trial. The other points stated it is unnecessary to consider.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be canceled, avoided and annulled, and a new trial granted. It is further ordered, that the case be remanded to the lower Court, to be proceeded with according to law.

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No. 884.—NANCY A. FENN et al. v. F. W. CARR.

The sale of a negro woman as a slave, after the adoption of the Constitution of 1864, is an absolute nullity.

**A**PPEAL from the District Court, Parish of East Feliciana, *Posey, J.* *W. F. Kernan*, for plaintiffs and appellants. *D. J. Wedge*, for defendant and appellee.

**LABAUVE, J.** On the 1st day of January, 1865, the defendant sold to the plaintiff a negro woman, with full warranty, for the consideration of five bales of cotton and a note of Samuel Harrell for \$200. The plaintiff now, alleging the nullity of this sale, and praying that it be declared null, claims of the defendant \$1,000, for the value of said five bales of cotton, and for the return of the note or its amount.

The defendant admits, in his answer, the sale, but says that he did not warrant the said negro a slave for life, and that plaintiff was fully aware of the nature of the title to said negro; and plaintiff purchased an uncertain hope, and that he has no ground of action.

After hearing the testimony, the District Court gave judgment for defendant, and the plaintiff took this appeal.

The act of sale, introduced in evidence, shows that the defendant sold the negro woman on the 1st of January, 1865, as alleged by the plaintiff.

We are clearly of opinion that this sale was an absolute nullity, the negro woman being a free person on the 1st January, 1865. See the Constitution of 1864.

Plaintiff has proved that cotton was worth, in that parish, in January, 1865, from twenty-five to thirty cents per pound, but has entirely failed to prove the probable weight of the five bales of cotton. It is impossible for this Court to give a final judgment for plaintiff; the case has to be remanded, at the costs of the plaintiff, in order to ascertain the quantity of pounds of cotton he gave in payment.

It is therefore ordered and decreed, that the judgment of the District

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Court be annulled and avoided, and that the sale of the negro woman Listinia, sold by defendant to plaintiff, on the 1st of January, 1865, be declared a nullity. It is further ordered and decreed, that the case be remanded for a new trial, to ascertain the weight and value of the cotton on the 1st of January, 1865, and also whether the defendant should return the note of Samuel Harrell or pay its value; and, as the case is remanded for the benefit of the plaintiff and appellant, it is ordered that he pay costs of appeal.

No. 863.—J. S. BOSSIER *v.* W. E. KENNEDY et al.

The fact that plaintiff bought succession property at sheriff's sale, while it was advertised by the sheriff for sale in another cause, does not of itself render the sale null.

**A** PPEAL from the District Court, Parish of St. Tammany, *Jones, J. G. H. Penn*, for plaintiff. *Alfred Hennén*, for defendant.

HOWELL, J. Plaintiff has appealed from a judgment sustaining a motion to dissolve the injunction sued out in this case, on the ground that no legal cause is set forth in the petition for the injunction.

The allegations are, that he is owner and possessor of certain lands purchased on 28th October, 1865, at the succession sale of the estate of the late Joseph S. Bossier, made by the sheriff, as shown by an act of sale before the parish recorder, by the testamentary executrix of said estate, in pursuance to said adjudication; that the sheriff has advertised the same for sale on 4th November, 1865, under a pretended writ of seizure and sale, issued on 4th September, 1865, at the suit of *W. E. Kennedy v. Joseph S. Bossier*, or his succession, to the injury and damage of plaintiff, and that the defendant Kennedy is without claim of any kind against the said lands of plaintiff.

Such allegations, if established (and for the purposes of the rule are taken as true), will authorize an injunction of the threatened sale.

The fact that the sale to plaintiff occurred during the advertisement of the sheriff sale, does not, of itself, render said sale null. The evidence, which plaintiff may under his allegations adduce, may show the sale to him to be valid and to convey the property unincumbered.

We are referred to no law which requires succession sales to be made only on the first Saturday of each month, as in case of sheriff's sales.

It is therefore ordered that the judgment of the lower Court be reversed, the motion to dissolve dismissed, and the cause remanded to be proceeded in according to law, appelleas to pay costs of appeal.

No. 1307.—JOHN G. BURTON *v.* THOS. KRON et al.

Plaintiff commenced a suit by executory process, to enforce the payment of promissory notes secured by mortgage on real property. Defendants enjoin the sale on the ground that the plaintiff is without title to the notes. The notes bear no endorsement or assignment; in answer to the injunction plaintiff alleges a transfer to him by all parties in interest of the notes sued on: *Behl*—That unless plaintiff shows a transfer of the notes, made in strict conformity to law, the injunction will be maintained.

**A** PPEAL from the District Court, Parish of St. Helena, *Ellis, J. Wilson & Thompson*, for plaintiff. *Hennen & Perrin*, for defendant.

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HOWELL, J. John G. Burton, as holder and owner, obtained an order of seizure and sale upon three notes, amounting to \$4,000, and secured by mortgage on real property in the town of Tangipahoe, parish of St. Helena, in payment of which they were given by Thos. Kron, the purchaser, and Edward Ricks, the other defendant. The notes are made payable "to John J. Wheat, sheriff, for the use of the succession of Barbara Burton, deceased," and bear no endorsement or assignment.

Kron enjoined the sale on various grounds, one of which, want of title in plaintiff, is urged in this Court. Plaintiff, in answer to the injunction, alleged a transfer to him by all parties in interest of the notes sued on, and by praying for a judgment changed the executory to ordinary proceedings.

Judgment was rendered dissolving the injunction, and condemning defendant, Kron, to pay the amount of the notes less \$1,000 paid thereon, and ordering the mortgaged property to be sold; from which defendant has appealed.

It appears that there are seven heirs to the estate of Barbara Burton, for the sale of whose property the notes in suit were given, and the only evidence which appears in the record to establish the alleged assignment to plaintiff, is an informal appearance by counsel, of several of said heirs, in the following form:

"Now comes Elizabeth F. Womack, R. Y. Burton, Madison Burton and John Burton, tutor, and Delia Strickland, wife of C. E. Strickland, legal heirs and representatives of Celia Burton, and representing that they had transferred to John Burton all their respective interests in the notes sued on prior to the institution of this suit, alleges that the injunction herein sued out should be dissolved, wherefore they join defendant in his prayer for the dissolution of said injunction, with costs and damages. By their attorneys. (Signed) AMITER & WILSON."

Admitting that third persons can thus become parties to a suit, and through counsel make judicial admissions in such a manner, and for such purpose (which we are not prepared to do), we cannot consider this proceeding sufficient. It is apparent that some of the above parties are minors, and others married women, who are not properly authorized to appear in Court, and no legal assignment of their rights is shown, and, besides, one of the heirs, the minor, Thomas Amacker, is not represented, and the document itself is vague as to the alleged transferee, and the intestate or author.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of Thos. Kron, perpetuating the injunction herein, with costs in both Courts.

## No. 6885.—A. B. JAMES v. CITY OF NEW ORLEANS.

Where the City Assessor for the City of New Orleans has placed an over valuation on property, thereby causing an increase on the taxes thereon, and the board of assessors fail or refuse to make the reduction in the valuation, the party aggrieved may recover, by suit in the civil courts, from the city, the amount that he has been compelled to pay, on account of the over valuation of the assessment.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*John H. New*, for plaintiff and appellee. *Thos. H. Hewes*, City Attorney, for defendant and appellant.

HOWELL, J. Plaintiff obtained a judgment against the defendant for \$399, the amount claimed, as paid under protest, for taxes in excess of the true valuation of his real property in the city, from which the latter appealed.

The city attorney, in his brief, concedes that, upon the testimony, the plaintiff was entitled to have the valuation of his property reduced in accordance with his application to the board of assessors; but contends that, upon the statement of Watkins, a member of the board, a reduction of \$5,000 was made, thus leaving the difference in the appraisement of the assessors and that claimed by plaintiff to be only \$19,000, instead of the sum set forth in the petition, the tax on which would be less than the amount allowed by the Court, which, he insists, is unsupported by evidence. In this the city attorney has fallen into an error of fact, as to the valuation on which the assessment should be made. By an agreement in the record, the cause was submitted in the lower Court "upon the pleadings, the tax bills furnished by the plaintiff, and the statements of John A. Watkins, J. B. Walton and Julian Neville."

These tax bills show that plaintiff's property was assessed in 1857 (the year complained of) at \$159,500, and in 1856 at \$132,400, taken as the true basis for the assessment, making a difference of \$27,100, the tax on which, at 1½ per cent., is \$406 50, instead of \$399, the sum allowed; and the testimony shows that said property was worth no more in 1857 than in 1856.

Plaintiff does not complain of the judgment.

The admission that plaintiff was entitled to the reduction claimed by him, in his application to the board of assessors, concedes his whole demand, as set forth in the petition and the evidence adduced.

Judgment affirmed.

## No. 1252.—N. K. KNOX v. WM. S. BOOTH.

A lessor has a privilege on the growing crop of the year, to secure the payment of the rent; and the lessee cannot defeat the lien, without showing that he has been damaged by the interference of the lessor during the year. When it is agreed between the lessor and lessee that the lien shall be reduced to writing, and it is not done, the lessee must show, by evidence, that he has been damaged by the refusal, before he can claim the damages.

**A** PPEAL from the District Court, Parish of East Baton Rouge, *Avery, J.*  
*Dunn & Herron*, for plaintiff and appellant. *Joor & Stafford*, for defendant and appellee.

HYMAN, C. J. Plaintiff alleged that defendant rented from him for the year 1866, a certain plantation in the parish of East Baton Rouge, and that the price defendant agreed to give for the rent of the plantation for that year, was 2,600 pounds of ginned cotton.

He obtained a writ of provisional seizure, and caused a part of the crop of cotton made on the plantation that year to be seized provisionally.

He prayed that judgment might be rendered against defendant, condemning him to deliver to him, plaintiff, 2,600 pounds of ginned cotton, or to pay the value of same with interest; that his privilege as lessor on the crop made on the plantation that year be recognized and enforced. Plaintiff further prayed for general relief.

Defendant, in his answer, admitted the contract of lease, but asked in reconvention judgment against plaintiff of \$10,000 for damages, averring that he had suffered damages to that amount, caused by interruptions and molestations on the part of plaintiff during the lease.

The case was tried by a jury, who returned a verdict in favor of defendant, releasing him from plaintiff's claim.

The judge rendered a judgment thereon, rejecting plaintiff's demand, releasing the property seized, and condemning plaintiff to pay the costs of suit.

Plaintiff has appealed from the judgment.

There is no evidence that authorized such a verdict.

There is no proof of damages done to defendant by plaintiff, by interruptions or molestations.

It is proved that plaintiff, in June, 1866, attempted to get rid of defendant as his tenant, because plaintiff doubted that defendant would pay for the rent of the land. Plaintiff failed in his attempt, and it is not shown that, by the attempt, the defendant was injured.

Defendant contends that plaintiff's refusal to reduce the lease to writing, as was agreed upon, was an injury to him. If so, he has not shown it. He still held the land, and cultivated it. There is no proof in the record that ginned cotton was worth thirty cents a pound.

It is ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further decreed, that defendant be condemned to deliver to plaintiff two thousand six hundred pounds of ginned cotton, or to pay plaintiff the sum of seven hundred and eighty dollars, with five per cent. per annum interest thereon, from the 1st day of October, 1866.

It is further decreed, that the provisional seizure be sustained.

It is further decreed, that the plaintiff's privilege, as lessor, on the crop made on the plantation in the year 1866, be recognized and enforced.

It is further decreed, that the claim of defendant for damages be dismissed.

The defendant to pay all costs of suit.



## No. 883.—EVANS WHITE v. T. &amp; V. McKEE.

The act of the pretended Legislature of Louisiana, approved June 10, 1863, suspending prescription during the war, and for one year after the ratification of the treaty of peace between the Confederate States and the United States, is not law. The pretended legislators could not make laws: they were never qualified: they did not take the essential oath.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J.*  
*John McVea* and *C. P. DeLee*, for plaintiff and appellee. *W. F. Kernan*, for defendants and appellants.

Defendants plead prescription of one year, under Article 3499, Civil Code.

Plaintiff met this plea with the act of the Legislature, approved June 10th, 1863, which reads as follows:

“An act suspending all prescriptions.

“Sec. 1. Be it enacted, etc., That all prescriptions of any kind and every nature whatsoever, be and the same are hereby suspended during the existing war, and for one year after the ratification of a treaty of peace between the Confederate States and the United States; provided, that this act shall not operate on any person having adhered to the public enemy, by taking the oath of allegiance to the United States, or in any other way giving them aid and comfort.

(Signed)

ADOLPHUS OLIVIER,

Speaker of the House of Representatives.

H. M. HYAMS,

Lieut. Gov. and President of the Senate.

“Approved June 10th, 1863.

THOMAS O. MOORE,

Governor of the State of Louisiana.

“A true copy:

P. D. HARDY, Secretary of State.”

HYMAN, C. J. Plaintiff instituted suit in August, 1865, against Thomas McKee and Virgil McKee, for board and lodging due in the year 1862, and Thomas McKee is appellant from a final judgment rendered against him in favor of plaintiff.

In the lower Court the defendant, Thomas McKee, filed the plea of prescription of one year. He also plead in reconvention, and claimed judgment against plaintiff for the proceeds of six bales of cotton.

It appears, from the evidence, that the proceeds of the six bales of cotton were, by agreement, to be credited on plaintiff's claim.

There is no proof in the record that prescription was interrupted or suspended.

The plea of prescription is valid. See Civil Code, 3499.

The authority referred to in plaintiff's brief is not law.

The pretended legislators could not make laws; they were never qualified; they did not take the essential oath.

Let the judgment of the District Court against the defendant, Thomas McKee, be annulled, avoided and reversed, and let the suit of plaintiff against him, Thomas McKee, be dismissed.

No. 1245.—C. H. BEIGEL, Wife of MICHAEL BEIGEL *v.* JULIUS LANGE and HENRIETTA LANGE, his Wife.

When the wife brings a suit on a promissory note in her favor, and alleges in the petition that her husband joins in the suit, with no allegation or evidence of a separation of property between them, and no stipulation against a community of acquests and gains, the Court will not presume the authorization of the husband, but, on the contrary, will presume a community between them. The note being given in favor of the wife, does not make it her separate property; it is still community property.

**A** PPEAL from the District Court, Parish of Livingston, *Ellis, J.*  
T. C. W. *Ellis* and J. W. *Addison*, for plaintiff and appellee. *Marr & Foute*, and *Bradley*, for defendant and appellant.

HYMAN, C. J. Julius Lange gave his note to Catharine H. Beigel for \$1,000. At the time that the note was given she was the wife of Michael Beigel.

She brought suit against Julius Lange and his wife, to recover of them the amount of the note with interest thereon, and in her petition she alleged that her husband joined in the suit, and assisted and fully authorized her to institute the same.

There was judgment against Julius Lange, condemning him to pay the plaintiff the amount of the note with interest, and the costs of suit. From this judgment he has appealed.

There was no evidence adduced in the lower Court, showing that plaintiff's husband had joined in the suit, or authorized his wife to institute it. There was no evidence that there was any stipulation between Michael Beigel and plaintiff, that there should not be a community of acquests and gains between them during their marriage, nor that the note sued on was the separate property of plaintiff. Without such evidence we cannot presume that the husband authorized this suit, but we are to presume that there is a community between Michael Beigel and plaintiff, and that the note sued on, being acquired during their marriage, is community property. See C. C. 2369, 2371.

The note having been given in favor of the wife does not make it the property of the wife. It is still community property.

The plaintiff's husband, not the plaintiff, has the control of the note, and she has no right to recover judgment in his favor for the same. C. C. 2373.

Let the judgment of the District Court be annulled, avoided and reversed, and let this suit be dismissed, as to defendant, Julius Lange.

No. 705.—MRS. C. DUPLANTIER et als. *v.* E. C. WILKINS and E. B. PRESTON, *in solido*.

The plaintiffs, as lessors, have the first privilege on movables seized and sold on a plantation, except on the crops; on which the laborers and overseer have a preference.

The proceeds of the crop being exhausted, the sheriff has no right to pay the overseer out of proceeds of movables, to the prejudice of the lessor.

Where large fees are charged by the sheriff and clerk, and the sheriff fails to annex to his return specific bills for their fees, the case will be remanded to adjust the fees of those officers.

**A** PPEAL from the District Court, Parish of St. James, *Beauvais, J.*  
A. *Robert*, for plaintiff. *Fred. Landreaux*, for intervenor.

LABAUVE, J. The plaintiffs sue the defendants as lessees of a plantation, for \$6,666 66, balance due for rent. A writ of provisional seizure was granted, and the sheriff, on the 10th of October, 1864, seized all the movable property attached to said plantation, all the fruits produced, gathered and ungathered, the mules, horses, cattle, and other animals, carts, etc., belonging to the plantation, the furniture and movable effects in the houses.

The plaintiffs, having obtained judgment, took out an execution, and the sheriff seized the property provisionally seized, and, after advertisements, sold the same on the 31st December, 1864, and made his return on the 20th March, 1865, by which he shows that the debts, expenses, costs alleged to be privileged, and paid by him, amounted to..... \$4,682 96  
And the proceeds of sales..... 3,801 60

Balance in favor of sheriff..... \$881 36

On the 17th April, 1865, A. Robert, of counsel for plaintiffs, suggested to the Court that J. Landry, sheriff, has seized and sold in this case, movable property to the amount of \$3,801 60, to satisfy the judgment herein of \$6,666 66, exclusive of interest and costs, next to the laborers' claim, amounting to \$1,750 06, which has been paid, leaving a balance in his hands of \$2,050 54; and, upon further suggesting to the Court that demand had been made for said balance, the sheriff refused to pay.

It was ordered by the Court that the said sheriff show cause why the above balance should not be paid to plaintiffs or their attorney.

The Court gave the following decision :

"In the within rule, after hearing the parties, the Court considers that the sheriff was correct in all his charges, except the two charges for notices of sale, and the charges for services of citations, petitions, writ of provisional seizure, *feri facias*, notice of trial, notice of judgment, mileage, ferry, etc., which were ordered to be reduced to tariff charge or fee bill.

"Rendered in open Court, April 22d, 1865.

(Signed)

R. BEAUVAIS, Judge."

The plaintiffs took this appeal.

The plaintiffs, as lessors, had the first privilege on the movables and effects seized and sold, except on the crops, on which the laborers and overseer had a preference. C. C. Arts. 2675, 3226. The sheriff took upon himself to pay the laborers \$1,751 06, and to the overseer \$990; when it is shown that the proceeds were even insufficient to pay the laborers; having exhausted all the proceeds of the crop without paying the overseer, he had no right to take the proceeds destined for the plaintiffs, to pay the overseer; he must bear the consequences and suffer the loss. It is true that, upon the account of the overseer for \$990, the District Judge seems to have given an *ex parte* explanation, authorizing its payment, in the following form :

"The within bill has a privilege equal to that of the laborers. I cannot conceive that there can be a difference between the privilege of the white and black laborer; this man's claim is, and must be, included in my judgment ordering the payment of the laborers.

R. BEAUVAIS,

Judge Fourth Judicial District.

"St. James Parish, Jan. 20th, 1865."

Duplantier et als. v. Wilkins et als.

But, as it is observed above, the sheriff used all the proceeds of the crop in paying the laborers. This account is therefore rejected.

The following charges paid by the sheriff, for certain expenses, provisions and others, incurred whilst the property was under seizure in the hands of the sheriff, are considered as costs in the suit and properly paid by the sheriff, besides the amount paid the laborers :

Paid Thomas Conway, superintendent of the bureau for conscripts, on the plantation.....	\$26 65
Paid Roman & Olivier, for supplies.....	597 45
Paid Poche for gathering pecans.....	35 00
Paid F. Genre for rivets for corn mill.....	8 00
Paid for supplies.....	102 75
Add amount paid laborers, and admitted by the plaintiffs.....	1751 06
Total allowed absolutely.....	\$2520 71
Total amount of sale made by the sheriff.....	3801 60
Deduct the above amount allowed absolutely.....	2520 71

Balance in the hands of the sheriff, \$1280 89 subject to be reduced by the fees of the clerk and sheriff, to be shown and exhibited by fee bills, made as prescribed and authorized by law. R. S. p. 124, §§ 2, 5 and 6.

The sheriff has failed to annex to his return specific fee bills of his fees and those of the clerk, as required by law, and, in the absence thereof, we cannot decide whether the large fees charged by said officers are correct or not ; and the case, upon the rule, must be remanded, to determine the just and legal amounts due said sheriff and the clerk for their fees.

It is therefore ordered and decreed, that the judgment of the District Court be annulled and avoided ; that the amount of \$990, charged by the sheriff as paid to the overseer, be rejected ; that the case upon the rule be remanded, to ascertain the just fees of the sheriff and the clerk, and, when fixed, the same shall be credited to the sheriff upon the balance of \$1,280 89, now in his hands, according to the statement above, and the remainder to be paid to the plaintiffs. It is further ordered and decreed, that the sheriff pay the costs of this appeal.

#### No. 1274.—CHARLES CRANE v. MICAJAH HARRIS.

Where one party leases a livery stable and premises to two parties in partnership, and one of the lessees purchases the interest of the other, and gives a warranty against all liability, and the lessor recognizes the sale and release of one of the lessees by the other, by receiving the rent and giving him written notice that his lease will terminate at a certain date, the lessee who has been released is a competent witness to testify in a suit for damages between the lessor and lessee.

**A**PPPEAL from the District Court, Parish of East Feliciana, Posey, J. P. Powl, Jr., and McVea & Hunter, for plaintiff. J. B. Smith, for defendant.

TALIAFERRO, J. The plaintiff, together with one Jarrett, then a partner of his, leased from the defendant a livery stable and premises attached, as the plaintiff alleges, for the term of five years, at a certain sum per

Crane v. Harris.

annum, the plaintiff to be reimbursed at the expiration of the lease for all necessary repairs, work and improvements he might have to do upon the premises during his occupation of them. He avers that the defendant, in violation of the contract, sold the leased premises long before the expiration of the lease, and that the vendees were put into possession by the defendant to the great injury and damage of the plaintiff, who was compelled to abandon the property. He claims three hundred dollars for repairs, and one thousand dollars damages for the tortious act of defendant in dispossessing him.

The defendant denied all the allegations of the plaintiff, except that of having leased the stables, and claims in reconvention seven months' rent of the premises, at the rate of twelve dollars per month. The case was tried before a jury. A judgment was rendered in favor of the plaintiff for three hundred and forty-eight dollars, subject to a credit of thirty-seven dollars and seventy-five cents in favor of the defendant, and costs of suit. From this judgment the defendant appealed.

Four bills of exception were taken by defendant during the trial—three of these relating to matters touching the claim for damages, which the plaintiff having abandoned by acquiescing in the judgment and asking that it be affirmed, need not be considered. The other was taken to the admission of the testimony of Jarrett, who was the partner of the plaintiff at the time the contract was entered into—the lease having been made to Crane & Jarrett by the defendant. It appears by the evidence that, some time after this contract was entered into, Jarrett sold his entire interest in the lease, the stock, vehicles and everything else relating to the business they were engaged in, to Crane; and that, upon the first trial of this case, Crane executed in favor of Jarrett a release in full, in warranty as well as otherwise, from all liability that might arise out of the business they had been engaged in. Crane thereupon introduced Jarrett as a witness. The objection was that Jarrett, as a partner in the commercial partnership of Crane & Jarrett, was bound *in solido* to the defendant for the balance of the rent due the defendant. The record discloses that, long after the sale from Jarrett to Crane, the defendant notified the plaintiff individually of the termination of the lease, using (in the written notice) this language: "The lease you hold will terminate on the 30th June, 1858." In April, 1858, he took a due-bill individually from the plaintiff for rent due at that time. He admits, in his answer, that he rented the livery stable to plaintiff; avers that the plaintiff owes him for the use and rent of the property from the 1st January, 1858, to 1st of August of that year; claims rent for that period from the plaintiff in the reconventional demand, and nowhere in his answer sets up any claim against the partnership. These facts seem to have satisfied the Judge *a quo* that the defendant did not look to the partnership, but to the plaintiff alone, for the payment of rent, and therefore, upon the release by Crane to Jarrett, admitted the latter to testify. In this, we think, the Judge did not err. *Menam v. Worsham*, 4 N. S. 198. The entire evidence warrants the conclusion that the verdict of the jury did justice between the parties.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.



No. 1301.—CLARK & THIENEMAN v. A. J. NORWOOD and J. B. SMITH.

In a contract of sale of a lot of cotton a clause was inserted that all parties waive and renounce the benefit of any law requiring actual delivery by weighing, as a condition to complete the sale:  
*Held*—That the sale is complete from the date of the signing the act, and the cotton is at the risk of the purchaser from that date without actual delivery.

An agent having charge of cotton purchased is bound to exercise a prudent care over it, and preserve and ship it to his principal, but he is not responsible against an overpowering force, whereby the cotton is destroyed, and ruinous loss occurs.

Where the evidence shows that the Citizens' Bank was in the habit of paying in Confederate treasury notes, or notes of the local banks, at the option of persons presenting checks for payment, the Court will not presume that the payment of a particular check was made in Confederate treasury notes.

**A**PPEAL from the District Court, Parish of East Feliciana, *Posey, J. W. F. Kernan, Burgess & Choney, and F. Hardesty*, for plaintiffs and appellants. *Furqua & Kilbourne, and J. McVea*, for appellees and defendants.

**TALIAFERRO, J.** On the 14th February, 1862, the plaintiffs entered into an agreement with the defendant through Hawkins & Norwood, acting as his agents, the substance of which seems to be that the plaintiffs were to pay the defendant, Smith, three thousand dollars upon the signing of the contract, for one hundred bales of cotton, of the average weight of four hundred pounds, which cotton, as the act expresses it, was then "being stored, and to be stored on his plantation, "Oak Grove," near Williamsport, Pointe Coupée parish, Louisiana."

This lot of cotton was to be sent to one of the cotton presses in New Orleans for the plaintiffs, "within four weeks from the opening of the port of New Orleans, either by the raising of the blockade or by other means;" and the seller bound himself to send the cotton to New Orleans at any time before the raising of the blockade, provided the buyers could obtain the permission of the governor to that effect. One clause of the contract is, that "all parties waive and renounce the benefit of any law requiring actual delivery by weighing as a condition to complete the sale."

The commercial firm of Hawkins & Norwood signed this obligation, and bound themselves to furnish the purchasers with the like number of bales of cotton, of like weight and quality as called for by the contract, either by purchase from others or out of other receipts or stocks in their hands.

The plaintiffs allege an entire failure on the part of the defendants to fulfill their part of their contract, and pray that they be condemned *in solido* to deliver to plaintiffs the said one hundred bales of cotton according to the terms of the contract, with interest on the value thereof, or, failing in that, that they pay the plaintiffs one hundred thousand dollars as damages, and for general relief.

The defendant, Smith, in his answer, admits the contract sued upon, and avers that he complied with it as far as it was possible to do so. That from the time of the sale the cotton was at the risk of the plaintiffs; that the cotton sold to plaintiffs, together with defendant's entire crop, was destroyed by an overpowering force, which he was unable to resist, and without any fault of his; that all the cotton produced in the year 1861,

on his plantation, called "Oak Grove," was burned by armed bands of men, on or about the 10th of May, 1862. He further avers that, under the agreement entered into with plaintiffs, they were to pay him three thousand dollars, upon his signing the act, but that they have failed to do so; that the pretended payment made by them was in notes issued by the "so-called Confederate States," and that if said notes were received by his agents, they were so received without his authority, and that the said pretended payment is not binding upon him, and that the plaintiffs are indebted to him for the full value of the said cotton, viz: three thousand dollars, with five per cent. interest, from the 14th February, 1862. He avers that the dealing in and using Confederate treasury notes was contrary to law and good morals. He prays judgment in reconvention against the plaintiffs for three thousand dollars and interest, and tenders them a transfer of all his right to claim damages against the parties who burned the cotton.

The defendant, Norwood, admits he was a member of the commercial firm of Hawkins & Norwood, but denies that he ever signed or sanctioned the contract sued upon; that the act of guarantee or insurance expressed in the instrument sued upon, if signed with the partnership name, was an unauthorized act of his partner Hawkins, not within the range of the business they were engaged in, and not obligatory upon him. Upon these issues the parties went to trial before a jury, which rendered a verdict in favor of the defendants, rejecting the defendant Smith's reconventional demand. The plaintiffs have appealed.

We think the evidence fully sustains the defense. It is sufficiently clear from the written contract, expressed as it is in terms somewhat obscure, that the plaintiffs bought of the defendant, Smith, one hundred bales of cotton of his crop, grown on the "Oak Grove" plantation, in the year 1861. That in conformity with the agreement, Hawkins & Norwood received the plaintiffs' check on the Citizens' Bank, for three thousand dollars, which check was endorsed by Hawkins & Norwood, or some one authorized by them, and placed to their credit in the bank. It is equally clear from the words of the act and its general tenor and import, that from and after the signing of the instrument the sale was complete; the hundred bales of cotton delivered and at the risk of the purchasers; that the only obligation remaining on Smith was that of using a prudent care over the cotton to preserve it, and to ship it to the plaintiffs in New Orleans in accordance with the stipulation in regard to that part of the contract; that before the time arrived, at which he was bound to forward the cotton to the plaintiffs in New Orleans, the entire crop produced on the "Oak Grove" plantation, in the year 1861, consisting of over six hundred bales, was utterly destroyed by fire, producing a ruinous loss, which the exercise of no prudence or means whatever in the power of the defendant could have prevented, and he is therefore exonerated by Art. 1910 of the Civil Code.

Smith, having complied with his part of the obligation, Hawkins & Norwood were no longer bound under their guarantee for Smith's performance.

In regard to the reconventional demand set up by the defendant for the price of the cotton, we do not think it well founded. The testimony

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of the cashier and paying teller of the Citizens' Bank is to the effect that at the time the check of the plaintiffs in payment of the cotton was received, the bank paid Confederate notes or notes of the local banks, at the option of persons presenting checks for payment. This does not establish that payment was made in Confederate treasury notes. We see no reason why the judgment of the lower Court should be disturbed.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs in both Courts.

No. 1284.—EMILY SMITH, Wife, *v.* H. W. STRICKLAND, Husband—Mrs. ST. HELENA SPENCER, Intervenor.

In an action by the wife for a separation of property, where the creditor of the husband files his intervention on the day preceding the trial, and does not show due diligence, the intervention will not be sustained.

The articles of the two Codes upon this subject do not authorize an intervention to be filed at any stage of the cause. They must be construed together, and applied according to the circumstances of each particular case.

**A** PPEAL from the District Court, Parish of St. Helena, *Ellis, J.*  
*J. E. Wilson*, for appellee. *Russell and McVea & Hunter*, for appellant.

**HOWELL, J.** This case is before us on a bill of exceptions taken to the ruling of the District Judge, refusing permission to the appellant, a creditor of the defendant, on the day of the trial of the cause, to intervene, on the ground that the plaintiff could not be forced to combat or resist the intervention until after service thereof, which had not been made; and, as Art. 2408 C. C. authorizes the creditors of the husband to become parties to the suit by the wife for a separation of property, and *be heard* against her petition, the only question presented is one of diligence: Did the intervenor appear in time and in the manner to be heard?

She charged that the suit by the wife was simulated, and instituted to defraud the creditors of the husband, and expressed herself ready to proceed with the trial; but did not ask that the plaintiff be served and cited, nor for judgment against the defendant, her debtor. Her only object seemed to become defendant and resist the plaintiff's demand.

Article 391 C. P. permits one to intervene, either before or after issue has been joined in the cause, provided the intervention do not retard the principal suit; the person intervening must be always ready to plead, or exhibit his testimony; because he has always his remedy by a separate action to vindicate his rights.

Article 393 requires the intervention to be formed by a petition addressed to the Court before which the principal demand has been brought; it must set forth the grounds on which the cause is supported. This petition must be served on the party against which it is directed, in order that he may answer to the same in the delay given in ordinary suits.

Article 394 declares that the judge cannot refuse to admit an intervention; but he must pronounce on its merits at the same time that he de-

Emily Smith v. Strickland et al.

cides the principal action ; if the demand be not sustained the person intervening shall be decreed to pay the incidental costs.

According to Article 392, the intervenor is to be considered as plaintiff.

In the case of *Ardry v. Ardry*, 16 La. 264, the rule was established, and was confirmed in *Dubroca v. Her Husband*, 3 A. 331, that the intervenors in such suits were entitled to the delays necessary for serving citations upon the original parties, and for the latter to answer, although the effect might be to retard the progress of the cause ; but, in neither of those cases was the cause on trial when the intervention was demanded—in both citation was asked; in the former the plaintiff treated the intervening parties as properly in Court, by propounding interrogatories to some of them, thereby waiving the faculty of opposing the intervention on the ground that it retarded the proceedings ; and, in the latter, the intervenors waived the right to oppose the progress of the cause by an agreement with the plaintiff. The facts and circumstances, as well as the pleadings in both cases, are different from those in this case, and cannot be said to be authority in favor of the intervenor here, who, not having conformed to the rules prescribed for interventions, cannot complain if those rules are not enforced for her benefit. She did not allege or show diligence, nor that the parties were hurrying on the case with unusual rapidity. It is true the defendant's answer was filed only on the day preceding the day of trial and intervention, but the suit had been instituted nearly six months previously, and the record shows that the cause had been regularly assigned for trial ; and it was only when it was taken up that the appellant attempted to intervene. This, we think, was too late, without some further showing than the appellant has made.

We do not understand the Articles of the two Codes upon this subject, and the two cases above cited, are susceptible of such construction as to authorize an intervention *at any stage of the cause*. The Articles of the Codes must be construed together and applied according to the circumstances of each case, under the rules of pleading.

Judgment affirmed.

#### No. 1135.—STATE OF LOUISIANA v. DENIS, Colored.

In a criminal prosecution, where a witness has been examined by the State, and consigned to the defendant, he can only be re-examined by the State for the purpose of explaining any facts which may come out on the cross-examination, and must be confined exclusively to the cross-examination. The law has fixed no qualification of age, as to the competency to testify in criminal matters. The competency of a witness as to age, depends on his intelligence, judgment, capacity and understanding, all of which must be left to the discretion of the judge and the jury.

**A** PPEAL from the District Court, Parish of Jefferson, *Cazabat, J.*

*B. C. Elliott*, District Attorney. *N. Commandeur*, prosecuting for the State. *W. T. Scott* and *E. H. McCaleb*, for the accused.

**ILSLEY, J.** The defendant, having been convicted and sentenced to capital punishment for the crime of rape, appealed from the judgment of the District Court, and the case comes before this Court on two bills of exception.

The first bill was taken to the ruling of the Court below, by which a witness for the prosecution, before leaving the stand, but after the close of her cross-examination by the defense, was permitted to be reexamined by the State.

It appears that, on her first examination-in-chief, the witness had stated that the accused had thrown her down by force, and used her like a beast, and the reexamination was allowed in order to ascertain more clearly the meaning of the language used by the witness.

By the common law of England, which by our own law, governs in trials of crimes, offenses and misdemeanors (see 33  $\frac{1}{2}$  of the act of May 4th, 1805, Bullard & Curry, page 248, and which section is expressly preserved in force by the 73 section of the act relative to criminal proceedings, No. 121, of the session acts of 1855, also *State v. Lacombe*, 12 An. 196), a reexamination is allowed only for the purpose of explaining any facts which may come out on the cross-examination, and must be confined to the subject-matter of the cross-examination. *Roscoe Criminal Evidence*, 173. *Archibald's Criminal Pleading*, p. 157.

The late Court of Errors and Appeals admitted that this was the common law rule of criminal evidence, but observed that many of the rules, with regard to the examination of witnesses and the introduction of evidence, had been much relaxed, and that it is now understood to be the universal practice of the Courts of this State, in both civil and criminal proceedings, to permit a witness, after having been examined-in-chief, consigned and cross-examined by the party introducing him, to be reexamined upon points touching which he had not before testified; that this was discretionary with the Court. *The State v. Duncan*, 8 Rob. 563 and 564. This doctrine was also entertained in the case of the *State v. Parker*, 7 An. 84, wherein the Court, having in view the act of 1805, expressed the opinion that the ancient rules of evidence are subject to change, where it is indispensable to truth and justice, and that the whole tendency of modern decisions is to relax the strict rules of evidence with a view to lay everything before courts and juries, which ought to have an influence upon the cases before them, and to leave the objections as much as possible, consistently with an orderly and speedy administration of justice to the credit of the testimony and witnesses."

It is unquestionably true, that when the common law rules of evidence, in criminal proceedings, were adopted by the Legislature of this State; no rule was better understood nor more firmly established than the one now under consideration. It had always been deemed a wise and salutary one, and had been uniformly adhered to.

The discretion, which in the cases referred to, is claimed for Courts to relax, to change, or to utterly disregard rules of criminal evidence, which the Legislature has decreed it obligatory on them to observe, would be effectually to make the law a dead letter; cases might certainly occur, and this, perhaps, is one of them, wherein a relaxation of the rule might serve to advance the course of justice; but this is no reason why the general rules of evidence should not be observed, and until the law of evidence in criminal proceedings, now extant, is partially or wholly changed, our Courts are not justified in exercising their discretion in regarding or dis-



regarding rules of evidence, which our Legislature has adopted as a system.

It was well said by Lord Kenyon, that "rules of evidence are of vast importance to all orders and degrees of men, and that our lives, our liberty and our property are concerned in the support of them."

The second bill relates to the competency of a State witness, aged about eight or nine years.

The law has fixed no qualification of age, as to the competency to testify in criminal matters, and on that score there was no error in the ruling of the judge who received the testimony.

In a very late case, the *State v. Ross and Rogers*, 18 An. 342, this Court held that the incompetency of a witness as to age, depends upon his reason, intelligence, judgment, capacity and understanding, which are all matters of fact left to the discretion of the judge and jury.

The bill of exceptions discloses no reason to doubt that in this case, that discretion was wisely and cautiously exercised.

It is ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the case be remanded for a new trial, according to law.

#### No. 1238.—E. CARVER & Co. v. W. H. HARRIS.

A party bringing suit on an unliquidated demand must establish his claim with legal certainty.

**A** PPEAL from the District Court, Parish of Carroll, *Farrar, J. De France & Pilcher*, for plaintiff and appellee. *W. G. Wyley*, for defendant and appellant.

HOWELL, J. This is a suit on an open account for two gin-stands, dated 4th March, 1857, with interest from 1st January, 1858, when, it is alleged, the account was due.

The defense is a general denial and the prescription of three years.

There were two trials in the Court below, resulting each time in a judgment in favor of plaintiffs for \$800, the amount claimed, and defendant has appealed.

Two witnesses (examined under commission) testified on behalf of plaintiffs. By one, Charles Harrod, it is shown that, in July, 1856, plaintiffs shipped two gin-stands, of eighty saws each, to defendant, who, in 1857, gave a draft for their price on Brown, Cuddy & Co., which was not paid, and in 1858 a note was given for the amount, on which plaintiffs have obtained judgment in another proceeding.

By the other witness, George A. Peck, it is shown that in November or December, 1856, defendant ordered two gin-stands, to be one hundred saws each, at four dollars per saw, to be paid for out of the next crop after the delivery, interest to be added after the next 1st January following the delivery. He says: "The account annexed, marked 'A,' is correct, according to the terms agreed upon with defendant, and is also made in

conformity to the instructions of the plaintiffs to myself concerning the sales of gins at that time."

This account is not found in the record.

He says, further: "The amount due by defendant fell due on the next 1st January following the delivery of the gins at his landing. As the order was received in November or December, 1856, *it would probably be executed in the following spring*, which would be beyond the 1st January, 1857, and the account therefore became due on January 1st, 1858."

He does not say that the gin-stands were delivered. He speaks hypothetically as to the execution of defendant's order and the time at which the price would be due, according to the terms on which plaintiffs were then making sales. Such evidence is insufficient to authorize the judgment asked for. And particularly so, where the transcript contains the record of another suit for the price of two gin-stands, for which a settlement was had between the parties about the same time, and for which plaintiffs have obtained judgment. It is incumbent on plaintiffs to establish their demands with certainty.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant as of nonsuit, with costs in both courts.

No. 1242;.—POLICE JURY OF NEW ORLEANS (Right Bank) v. CLAUSS GARRETT.

Where the appellant allows three judicial days to elapse after the day fixed by the District Court for the filing of the transcript in the Supreme Court without obtaining an order extending the time, the appellee has the right to obtain the certificate of the clerk of the Supreme Court that the appeal has not been filed. If the appeal is afterwards filed in the Supreme Court, it will be dismissed on rule to show cause.

**A**PPEAL from the Third District Court of New Orleans, *Fellows, J.*  
T. E. Camus, for plaintiff and appellee. *Collens & Wooldridge*, for defendant and appellant.

LABAUVE, J. It appears that the defendant obtained an appeal from a judgment rendered in the above cause, returnable to this Court on the second Monday of February, 1867; that he suffered three judicial days to elapse subsequent to the return day, without filing the record of appeal, and that plaintiff and appellee took from the clerk of this Court a certificate of the non-filing of said appeal.

On the 19th of February, 1867, on motion of defendant and appellant, it was ordered by this Court that the plaintiff and appellee do show cause on Tuesday, 26th February, 1867, at 11 o'clock, A. M., why the certificate of the non-filing of the appeal in this case should not be set aside and canceled, and why the record of appeal should not be filed, on the following grounds:

"1. That the judicial day made on Thursday last should not be counted, with regard to appeal from the parish of Orleans, and said appellant having made a motion and showing on Monday last in due form.

Police Jury of New Orleans (Right Bank) v. Garrett.

2. That the facts shown by the affidavit and certificate filed yesterday, clearly entitle the appellant to relief."

This rule and application must be tested and disposed of under the dispositions contained in Article 883 of the Code of Practice, where it is directed that—

If the appellant has not filed in the Supreme Court, on the day appointed by the inferior judge, the record from the Court below, and was prevented from doing so by any event not under his control, he may, either in person or by attorney, apply to the Court before the expiration of the three days, after which the appellee may obtain a certificate from the clerk, declaring that the record has not been filed, and may demand a further time to bring it up, which may be granted by the Court, if the event causing its delay be proved to its satisfaction. \* \* \*

The three judicial days having expired without a motion by the appellant for an extension of time to file the appeal, the appellee had an acquired right to take the certificate, and we have in law no authority to set it aside and cancel it, except on proof, on the part of the appellant, that he was prevented from filing the appeal in the legal delay, *by an event not under his control*. The appellant has entirely failed to show any such event; he has not even shown any due diligence.

The rule is discharged, at the cost of the appellant.

#### NO. 786.—DAVID S. RHEA v. FREDERICK OTTO.

When goods, produce, or other objects are sold in the lump, they are at the risk of the purchaser from the date of the sale, but when sold by weight or measure, they are at the risk of the seller until they are weighed or measured. C. C. 2233.

**A**PPEAL from the District Court, Parish of East Baton Rouge, *Posey, J. Dunn & Herron*, for plaintiff. *Fuqua & Knickerbocker*, for defendant.

**LABAUE, J.** The plaintiff claims of the defendant a balance of \$5,475, remaining due on the sum of \$8,075, price of 95,000 pounds of seed cotton, sold and delivered to said defendant in the fall of 1863, at 8½ cents per pound in the seed.

The answer contains a general denial, and an admission that defendant in the fall of 1863, purchased cotton of plaintiff through his authorized agent, Olivia L. Woodward, but that he paid in full for the same.

The Court, after hearing the evidence, gave judgment for defendant, and the plaintiff appealed.

The only question in this case, is whether the cotton of plaintiff, after the agreement of sale, was at the risk of the plaintiff or the defendant. If sold in lump, it was at the risk of the purchaser; but if otherwise sold by weight, it remained at the risk of the seller. C. C. Art. 2433. The evidence shows, and the plaintiff's petition admits, that it was sold at so many cents per pound.

Nothing shows that the cotton was at the risk of the buyer until weighed; some lots were weighed and delivered, and paid for, as we are

Rhea v. Otto.

informed by the evidence, but there is no proof of any other cotton weighed and delivered.

The able opinion delivered by our learned brother below, and the testimony in the case, satisfy us that plaintiff has failed to make out a clear case.

We are of opinion that the District Judge gave a correct judgment, under the law and facts of the case, and for the reasons assigned by him his judgment must be affirmed.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, with costs.

NO. 1287.—ARTHUR CRAWFORD v. MARION CHAPMAN.

The verdict of the jury must be supported by the testimony in the record.

**A**PPEAL from the District Court, Parish of East Feliciana, *Posey, J.*  
*J. H. Muse, W. F. Kernan and Cross & Hardee*, for plaintiff and appellee. *McVea & Hunter and J. B. Smith*, for defendant and appellant.

**HYMAN, C. J.** The sheriff of the parish of East Feliciana seized a lot of drugs and medicines, the property of plaintiff, by authority of an execution, and on the 3d day of November, 1860, sold the same at public sale to defendant for \$1,505.

On the 5th day of the same month defendant agreed to sell to plaintiff the lot of drugs and medicines, provided that plaintiff would pay in claims or money the amount that he, defendant, gave for the same. Plaintiff was to continue in possession of the drugs and medicines, and to sell them for defendant until defendant was refunded the money that he had paid for them.

On the 3d day of January, 1861, defendant sold the lot of drugs and medicines to P. Langworthy.

In February, 1861, plaintiff brought suit against defendant. In his petition he claimed to be owner of the lot of drugs and medicines, by having paid for the same according to the above-named agreement.

He averred that defendant had sold to Langworthy other drugs and medicines belonging to him, plaintiff, than those included in the lot sold by defendant to him as per agreement, and that defendant had damaged him by the sale to Langworthy \$4,949 23.

For this amount he asked judgment against defendant.

There was a jury trial, and the jury having returned a verdict in favor of plaintiff and against defendant for \$3,000, the Judge rendered judgment in conformity with the verdict.

The defendant has appealed from the judgment.

There is no evidence in the record that justifies the verdict of the jury.

Plaintiff's pretense of judgment for the drugs and medicines, is founded on a receipt of defendant for a number of small accounts placed by plaintiff with defendant for collection.

Crawford v. Chapman.

The receipt shows that the accounts were not taken in payment. It states that the accounts were to be collected by defendant or returned to plaintiff.

Many of these accounts were worthless, and others not owing, and it cannot be presumed that defendant took them in payment for his lot of drugs and medicines, when his receipt contradicts such presumption.

Plaintiff has not shown the quantity or value of any other drugs and medicines which belonged to him, and which defendant sold to Langworthy, beside those of the lot he pretends to have bought from defendant.

There is evidence in the record which shows that plaintiff did not consider that he was the purchaser from defendant of the lot of drugs and medicines, for after the sale of same to Langworthy, he inquired of him if he would take \$500 for his bargain.

Let the judgment of the District Court be annulled, avoided and reversed, and let the suit of plaintiff be dismissed.

No. 1187.—NANCY SCHLATRE and Husband and ELIZABETH DEBLIEUX and Husband *v.* JACQUES ALFRED GREAUD.

The purchaser of mortgaged property who assumes the payment of the mortgaged debt becomes personally liable therefor.

**A**PPEAL from the District Court, Parish of Iberville, *Posey, J.* Johnson, Denis, Berault & Legendre, for plaintiffs and appellees. W. B. Robertson, for defendant and appellant.

LABAUE, J. This is a devolutive appeal from an order of seizure and sale granted by the District Court of the Parish of Iberville, on the 22d November, 1865, for the sum of \$16,000, with interest.

On the 27th March, 1858, Benjamin Deblieux and wife, two of the petitioners, being the owners of a plantation and slaves, by authentic act, sold to said J. A. Gréaud the two undivided thirds of the same, for the price of \$66,666 66, payable as follows, as stated in the act of sale :

The purchaser, J. A. Gréaud, assumes to pay in lieu and place of the vendors, in the same manner and form as they are bound to pay, the two-thirds of the following *mortgage debts* which are due by the said vendors, as follows :

1. Amount due the Citizens' Bank, is \$13,050, of which two-thirds is.....	\$8,700 00
2. Amount due Widow W. Dodd, \$16,000, of which two-thirds is.....	10,666 66
And the balance of the price remaining, say \$47,300, payable as follows :	
1. The sum of \$35,379 42, payable in cash, the receipt whereof is hereby acknowledged respectively by the said Mrs. Deblieux and husband.....	35,379 42
2. The further sum of \$11,920 58, payable in all the month of March next, 1859.....	11,920 58
Equal to the price of purchase.....	\$66,666 66



In this act intervened Mrs. Widow Wm. Dodd, who agreed to postpone the payment of the \$16,000 until the 1st of January, 1862, all interest to be paid annually.

On the 23d of December, 1858, by another authentic act, the said Debliex and wife sold out to said Gréaud the remaining undivided third, thus making him the owner of the entire property; and in this act of sale it is stated :

The price and consideration of the above sale, made to Jacques A. Gréaud, the purchaser, is \$37,386, payable as follows :

The purchaser assumes to pay, in the lieu and place of the said vendors, in the same manner and form as they are bound to pay, the one-third of the following mortgage debts, which are due by the said vendors, as follows :

1. Amount due to the Citizens' Bank of Louisiana by the said vendors and purchaser, is \$12,600, the one-third is. . . . . \$4,200 00
  2. Amount to the Widow Wm. Dodd, as per act passed before the undersigned notary, on the 27th March, 1858, is \$16,000, payable 1st January, 1862, the one-third is. . . . . 5,333 33 $\frac{1}{3}$
- And the balance of the price, say \$27,852 66 $\frac{2}{3}$ , payable as follows :
1. The sum of \$10,000, payable in cash, the receipt whereof is hereby acknowledged respectively by said Mrs. Elizabeth Debliex and her husband, B. Debliex. . . . . 10,000 00
  2. The sum of \$8,926 33 $\frac{1}{3}$ , payable in all March, 1860, with interest at 8 per cent. per annum from date till paid. . . . . 8,926 33 $\frac{1}{3}$
  3. The further sum of \$8,926 33 $\frac{1}{3}$ , payable in all March, 1861, with 8 per cent. interest per annum from date till paid. . . . . 8,926 33 $\frac{1}{3}$

Equal to the price of purchase. . . . . \$37,386 00

This act continues on and states that the purchaser has executed his two promissory notes accordingly, and to secure the payment thereof the one undivided third part of the property herein sold is to remain specially mortgaged.

The above sum of \$16,000, assumed by said Gréaud, was created in favor of the Widow Dodd, in the acts of 3d January, 1849, and of 18th February, 1851; both acts were passed before the recorder of the parish of Iberville and duly recorded.

Mrs. Widow Dodd having departed this life, Mrs. Debliex and Mrs. Schlatre, the plaintiffs (her daughters), were recognized her heirs and put in possession of her estate, and they brought this suit. Their quality of heirs is not disputed by the appellant.

But the defendant and appellant relies on two grounds only to sustain his appeal and to dismiss the order of seizure and sale :

1. That the mortgage given to secure the said debt was extinguished for want of re-inscription, at the time the order of seizure and sale was issued.
2. That the defendant is a third possessor, and should be proceeded against as such.

This position is untenable ; for it is clear that the defendant, in assumi-

Nancy Schlatter et als. v. Greaud.

ing the mortgage debt due Mrs. Widow Dodd, became personally bound and liable, in lieu of the original debtor, for the debt thus assumed. The \$16,000 was a part of the price of the property sold to him by Benjamin Deblieux, and was in law secured by the privilege of the vendor, and Mrs. Widow Dodd was authorized by law to proceed by order of seizure and sale of the property to satisfy her claim. Civil Code, Arts. 3216, 3238. Code of Practice, Arts. 732, 733, 734. 12 R. 279. 3 A. 603. 1 R. 135. 6 R. 407. 16 L. 223. 15 L. 184. 8 A. 267. 17 R. 66.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

## 1203.—NICHOLAS O'CONNOR v. CHARLES D. STEWART.

To bind parties against their will, for a specific sum under provisions of law, enacted in the public interest, all the formalities of such law must be rigidly observed; such parties may be liable on a quantum meruit, if it be shown that the work is necessary and useful to them.

**A** PPEAL from the District Court, Parish of Pointe Coupee, *Cooley, J. J. Yoist & A. Provosty*, for plaintiff and appellant. *F. H. Farrar*, for defendant and appellee.

**HOWELL, J.** Plaintiff alleges that on the 16th January, 1859, the inspector of the Third Levee District of the parish of Pointe Coupee, after observing all the formalities of law and in accordance with the regulations of the police jury, sold and adjudicated to him at public auction, the building of a certain portion of a levee on a tract of land belonging to defendant, at the price of 95 cents per cubic yard, which amounted for the whole work, accepted by said inspector, to the sum of \$2,768 30, for which he asks judgment with a lien and privilege on the land.

The defendant pleads a general denial, and specially denies that the requisite notices and advertisements were given or made in the manner required; that the adjudication was legally made; that the levee was properly and securely built, or that the regulations of the police jury were complied with by plaintiff.

Judgment was rendered in favor of defendant, and plaintiff appealed.

The evidence shows that the prerequisite written notice of the necessity of making the levee and specifying the place where such levee was to be built, its dimensions, the time when it was to be commenced and when completed, was not given to defendant; that the sale was advertised on 8th January for the 19th January, 1859; that the bond furnished by plaintiff was executed on 17th January, two days prior to the date fixed by the advertisement for the sale; that the levee was not of the height required by the police jury regulations, and that stumps and roots were covered up in the levee.

As it cannot be said that, under such a state of facts, the work was done in the manner required by law or the regulations of the police jury, the question is presented, can plaintiff recover in this action against the defendant, the proprietor, on the adjudication by the inspector, by which

the parish authorities undertook to contract for account of defendant? We think not.

In order to recover, we think it incumbent on plaintiff to show a strict compliance with all legal formalities and requisites, and the conditions of the contract or adjudication. To bind parties against their will for a specific sum under provisions of law enacted in the public interest, all the formalities of such law must be rigidly observed. Such parties may be liable on a *quantum meruit*, if it be shown that the work is necessary and useful to them. These principles have been recognized in several cases reported in our books, though applied to different circumstances. See 2 N. S. 455; 5 L. 45; 6 A. 177; 9 A. 67.

The District Court erred, however, in rendering a final judgment against plaintiff; it should have been one of nonsuit.

It is therefore ordered, that the judgment of the lower Court be reversed, and that there be judgment against plaintiff as of nonsuit, with costs; defendant and appellee to pay costs of appeal.

No. 1250.—J. MCKINBROUGH v. E. G. CASTLE, W. S. PIKE et als.  
Garnishees.

Where a case has been dropped from the docket, and afterwards restored to the docket, and put at issue by the defendant filing an answer, the garnishee is not entitled to notice of the restoration of the cause.

No evidence is necessary to authorize the taking of interrogatories for confessed against a garnishee, other than his failure to answer. C P. 263.

Judgments must be interpreted by the pleadings and the nature of the obligation sued upon. Garnishees sued as ordinary parties, cannot be condemned *in solido*; solidarity is never presumed.

**A**PPPEAL from the District Court, Parish of East Baton Rouge, *Posey, J.*  
A. M. Dunn, for plaintiff and appellee. J. O. Fuqua, for defendant and appellant.

HOWELL, J. This suit was commenced by attachment in January, 1861, upon a promissory note, and several parties were made garnishees, among them Wm. S. Pike and Henry A. Castle, composing the firm of Pike & Castle, partners in the cultivation of a plantation, to whom, as partners and separately, interrogatories were propounded, touching their indebtedness to defendant for the purchase of mules and the giving of a note for \$4,000 by said firm for the price thereof, which note plaintiff alleged was fraudulently assigned to H. A. Castle.

Pike was also interrogated as cashier of the Branch of the Louisiana State Bank at Baton Rouge, as to the deposit of said note in said bank.

H. A. Castle answered on 4th March, 1861, the interrogatories served upon him, admitting the execution of the note by the firm and the deposit thereof in the bank, but averred that it belonged to him, having bought it from E. G. Castle for a valuable consideration.

A motion was made by the defendant to set aside the attachment, which does not appear to have been disposed of, and no proceedings had in the case until 18th July, 1865, when the defendant moved to have the

case placed on the trial docket. On the next day plaintiff applied for a jury, and the transfer of the case to the jury docket. The motion to dissolve was assigned for trial on the 20th July, 1865, on which day the plaintiff obtained a continuance, upon several grounds set out in his motion therefor, one of which was that "under the rules of the Court all cases dropped from the docket, as all cases are when no action has been taken for two terms, cannot be reinstated on the docket without leave, and cannot be tried without notice to the parties, so that they may be prepared."

On 21st November following, a reassignment was made for the 27th same month. On 5th March, 1866, the case was assigned for 9th, and on that day reassigned for the 12th. On the 19th same month (March) defendant E. G. Castle filed an answer, confessing judgment as prayed for, and judgment by default was entered against the garnishees, including W. S. Pike, who had failed to answer. On the 23d, the third day thereafter, the interrogatories propounded to Pike were taken for confessed, and the case being assigned for trial, judgment was rendered against the defendant for the amount claimed, and "against Wm. S. Pike and H. A. Castle, comprising the firm of Pike & Castle, for the sum of four thousand dollars," from which Pike alone has appealed.

Edward G. Castle, the defendant, and Henry A. Castle, Pike's partner, ask that the judgment be affirmed.

Pike, the appellant, assigns as error apparent on the record :

1. This case, in the lower Court, was for a long time dropped from the docket, and appellant was not notified of its revival as required by the rules of said court.

No real or tacit issue having been made as to the appellant, the rule does not apply to him.

The cause could not have been on the trial docket and dropped, as complained of, so as to entitle him to notice of its being restored to the docket. It was at issue, during the delay alluded to, only upon the motion to dissolve the attachment, to which he was not a party.

2. There was no evidence exhibited to the Court *a quo*, to authorize the taking of the interrogatories addressed to the appellant, for confessed, nor any evidence that these interrogatories were served on him.

No evidence was necessary to authorize the taking of the interrogatories for confessed, other than his failure to answer. C. P. 263. 2 A. 565. 11 A. 691.

A default was entered against him. The interrogatories were embodied in and formed a part of the petition, which, by the sheriff's return, was personally served on the appellant.

3. The answers of H. A. Castle, to interrogatories propounded by plaintiff, show that appellant was not indebted to defendant, and had no property belonging to him in his possession or under his control.

The interrogatories referred to were propounded to and served upon the appellant and H. A. Castle, separately, and had reference to a purchase by them from defendant of a lot of mules for the sum of \$4,000. An additional interrogatory was propounded to appellant, asking if a certain note made by Pike & Castle in favor of E. G. Castle for \$4,000, is not on deposit in the bank of which he is the cashier, and if said note

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was not given for the purchase of mules by Pike & Castle from defendant.

H. A. Castle answered that he did purchase mules from defendant for the firm of Pike & Castle, and in part payment thereof gave their note for \$4,000, which is not paid, because before maturity it was purchased by him for a valuable consideration from defendant, and placed in bank by himself, where it has been attached by plaintiff.

This shows that Pike & Castle gave a note to defendant; that one of the firm became the owner thereof; that it is deposited in bank, and is not paid. It is clearly a joint note, and the interrogatories propounded to Pike, being taken as confessed, fix his liability thereon for one-half in favor of some one, and as no question is raised in this suit, as to the mutual rights of the makers, and H. A. Castle, the partner, does not complain of the judgment in favor of plaintiff, but asks its affirmance, we must conclude that Pike's liability is in favor of defendant, the payee. Upon the face of the record it is immaterial to Pike to whom he pays his portion of the note in controversy, which is still unpaid.

5. The note attempted to be attached, being drawn by a planting partnership, appellant is not liable *in solido*, and the judgment is erroneous in condemning each of the makers for the full amount.

It is in these words: "It is decreed that there be judgment against Wm. S. Pike and Henry A. Castle, composing the firm of Pike & Castle, for the sum of four thousand dollars."

Judgments are interpreted by the pleadings and the nature of the obligations sued on, and as these garnishees are sued as ordinary partners and the judgment does not condemn them *in solido*, they are held only as joint obligors. Solidarity is never presumed. 4 N. S. 317. C. C. 2088. 12 O. S. 316. 8 O. S. 635. 13 L. 449.

Plaintiff has prayed that the judgment be amended so as to allow interest from February, 1861, instead of from the date of the judgment, 31st March, 1866. The debt of the garnishees was due on 13th February, 1861, and by the confession, on 15th February, 1861; but the amendment can be made only as to the appellant.

It is therefore ordered that the judgment appealed from be so amended as to allow five per cent. interest on the amount, for which appellant Wm. S. Pike is condemned, to wit: two thousand dollars from 15th February, 1861, and as thus amended the judgment be affirmed, with costs.

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No. 1261.—WILLIAM PRATT v. THOMAS R. CRAFT.

Where plaintiff bought cotton of defendant, to be delivered at a certain place, but no time mentioned, he could refuse its immediate delivery. But no claim for damages will be sustained against defendant on account of the non-delivery of the cotton, without proof of his being put in default.

**A** PPEAL from the District Court, Parish of St. Helena, *Ellis, J.*  
*Wilson & Ellis*, for plaintiff and appellee. *E. F. Russell* and *T. G. Davidson*, for defendant and appellant.

*ISLEY, J.* The plaintiff claims from the defendant, as damages, the



sum of four thousand dollars, for the non-performance of a contract of sale, which contract is evidenced by the following receipt, signed by the defendant :

"Received William Pratt, this the 31st day of December, 1863, one thousand dollars, part payment on thirteen bales of cotton, at the rate of forty-seven cents per pound; cotton to be delivered at Pratt's plantation in good order, payment in full on delivery of cotton."

The defense was a general denial and a special averment that the plaintiff had no right to prosecute his action without a previous tender of the unpaid price of the cotton specified in the contract of sale, accompanied with an amicable demand for its delivery previous to the institution of his action ; which demand and tender the defendant expressly denies ever having been made previous to the institution of the suit.

The case was submitted to a jury, which rendered a verdict in favor of the plaintiff, and from the judgment of the Court, affirming the same, the present appeal is taken.

On the trial of the case, the Judge charged the jury that where a particular act is to be performed, at a designated time and place, and the party to perform is not at the place when the time arrives, ready to perform, he is in delay by the expiration of the time, and no other putting in default is necessary; and that, for the plaintiff to go to the plantation of defendant to demand a performance would be simply ridiculous, as the party could only be put in default by such demand at the time and place designated in the contract ; and to this charge the defendant excepted, and tendered his bill of exceptions, which was signed by the Judge.

We can perceive no difference in principle between the present case and that of *Erwin v. Fenwick*, 6 N. S. 229, in which it was held that damages cannot be claimed in a contract to deliver slaves at a designated place till the party is put in delay, although the day of delivery be fixed by the contract, and that the putting in delay is a condition precedent to recovery. By reference to the contract, the breach of which is the alleged basis of the present action, no time is fixed for the delivery of the cotton.

The plaintiff might, therefore, have claimed an immediate performance. 1907 Civil Code. 6 Toullier, 609. But the breach alleged being a negative or passive one, no damages therefor could be recovered without proof of putting in default. See Hennen's Digest, vol. 2, p. 1019, § 2. 1906, 1907 C. C. *Govel v. Municipality No. 1*, 11 An. 300. 7 La. 193. 17 An. p. 32.

As the plaintiff had not alleged or proved that the defendant had been put in default, in any one of the three different ways pointed out by law, the Judge erred in charging the jury in the manner stated in the bill of exceptions, and also in rendering judgment in accordance with the verdict.

It is therefore ordered, adjudged and decreed, that the verdict of the jury be set aside, and that the judgment thereupon rendered by the Court below be annulled, avoided and reversed ; and it is further ordered, that judgment be and it is hereby rendered in favor of the defendant and against the plaintiff, as in case of nonsuit, at the costs of the appellee.

No. 1232.—W. B. ROBINSON and G. CRUZAT v. JOHN HAYNES and Sheriff.

The Court will not declare a mortgage null for want of reinscription within ten years. The parties in interest have their remedy by causing the mortgage to be canceled.

**A**PPEAL from the District Court, Parish of Carroll, *Farrar, J.*  
*Sparrow & Montgomery*, for plaintiffs and appellees. *W. G. Wyley*  
for defendants and appellants.

HOWELL, J. On the 22d October, 1855, the defendant Haynes sold to A. M. Waddill a tract of land in the parish of Carroll, taking the notes of the purchaser, secured by mortgage and vendor's privilege, for the price; the two last of said notes maturing respectively on 1st January, 1864, and 1st January, 1866.

On 20th October, 1859, Waddill sold the property to H. B., J. S. & M. S. Troutman, receiving the purchasers' notes, secured also by mortgage and vendor's privilege; two of which notes having passed into the hands of plaintiffs, they instituted suit, *via ordinaria*, on them, in the District Court of Carroll, on 29th March, 1866, for the purpose of enforcing their mortgage and privilege on the property against the Troutmans.

On 22d January, 1866, more than two months prior thereto, the defendant, John Haynes, obtained an order of seizure and sale upon the two last notes held by him, against the same property, in a proceeding against Waddill, upon whom notice was served on 7th February following.

On the 7th day of the next April, plaintiffs instituted this proceeding to enjoin the sale and to have the mortgage and privilege in favor of Haynes and the order of seizure and sale thereon declared null and void, for the reason that said mortgage and privilege are "dead for want of reinscription within ten years."

Defendant excepted to plaintiffs' right to enjoin the executory proceedings against his mortgage debtor, or change the executory into ordinary proceedings. This exception was referred to the merits, and defendant answered by a general denial, and specially denying that plaintiffs' action is one of nullity, but an interpleading by third persons to arrest executory process on grounds of alleged irregularities and illegalities.

Plaintiffs contend that defendant is attempting to enforce, to their prejudice, an incumbrance which has no legal existence whatever, and that they are permitted to show it in this form of action, and to have the alleged mortgage declared null, as to them, and the sale prohibited.

If the mortgage sought to be enforced by Haynes has no legal existence, the attempted sale under it can in no manner prejudice or injure the plaintiffs' rights of mortgage upon the same property; and, consequently, they have no grounds, in this regard, for an injunction; and if Haynes's mortgage has validity, they cannot enjoin the sale under it.

Article 739 C. P. enumerates the only causes for which the debtor may enjoin the executory process; and, supposing the plaintiffs might exercise the debtor's rights in this respect, none of the causes specified in said article are set forth in the petition. Plaintiffs admit, and we think,

very properly, that the question of the prescription of defendant's mortgage is not involved nor raised. See 2 A. 113.

Articles 395 *et seq.* point out the means by which third persons may protect their rights. If they claim to be *owners* of the thing seized, they may, by petition, *oppose* and enjoin the sale. Plaintiffs do not claim as owners; they have set up a right upon the property, which, we have seen, will not be effective if defendant's mortgage does not exist, and which will not authorize the writ of injunction, if said mortgage has legal validity.

We are unable to perceive upon what principle plaintiffs can maintain this proceeding. They do not ask the mortgage to be erased. This they could have effected, under the Act of 1843 (Session Acts, p. 61), by simple application in writing to the recorder of the parish, and, perhaps, in a suit with proper parties and upon proper allegations. They do not allege fraud or error as the ground of nullity of the act of mortgage. They ask that the mortgage be declared null for want of reinscription within ten years. This is not declared by law to be a cause of nullity. Indeed, Art. 3333 C. C. recognizes the right of reinscription after the lapse of ten years, which is inconsistent with the quality of nullity. Inscription ceases to be evidence of the mortgage after the lapse of ten years, and is not subject to the rules of prescription; but it can be removed by the act of the creditor. 2 A. 109.

As plaintiffs have the means of protecting their rights, if imperiled, we are not inclined to sanction the engrafting of a new proceeding upon our practice. The case of *Klein v. Coon and Husband*, 10 A. 522, cited by them as authority for their action, is not in point. It was a suit to annul a judgment on the grounds of fraud, collusion, insolvency, etc., and the right to an injunction was sustained under Art. 303 C. P., which authorizes the writ whenever "necessary to prevent one of the parties to the suit from doing an act injurious to the other, and for which an action will lie." In this case we can see no injury, resulting from the act of defendant Haynes, which will give rise to an action against him by plaintiffs.

We think the exception to plaintiffs' right of action should have been maintained, as there is no legal cause for the injunction or the demand of nullity; but we do not consider the case one in which damages should be allowed.

It is therefore ordered, that the judgment appealed from be reversed, and that the injunction be dissolved and plaintiffs' petition dismissed, with costs in both courts.

No. 1179.—JOHN C. RAGAN, Administrator *v.* CATHERINE P. GWINN.

Where the vendor, in the sale of real estate, sells all the land lying between designated boundaries, there can be no increase or diminution of price on account of a disagreement of measure. C. C. 2471.

**A** PPEAL from the District Court, Parish of Terrebonne, *Gates, J.*  
*Bush & Goode*, for plaintiff and appellee. *Aycock & Mercier*, for defendant and appellant.

ILSLEY, J. This suit was brought to recover the amount of the last of the notes given as the price of a certain tract of land situated in the parish of Terrebonne, on the right descending bank of the Bayou Little Caillon, measuring one arpent and a half front, with the depth of survey, bounded above by the land of H. Cage, and below by the land of Paulin Tepandier.

Payment was resisted by the defendant in consequence of a deficiency of measure in the front line of the tract, which was sold as having one and a half arpents between the described lateral boundaries, whilst in reality there was only one-half arpent and twelve feet. She claims a diminution of the price for eighty-four feet, amounting to four hundred and fifty-two dollars and eight cents.

Another defense set up was that since the purchase made by the defendant, Henry Cage had brought an action of boundary against her, in which if he succeeded, there would remain to her only about seventy-nine feet front. She therefore prays that proceedings in this case be suspended against her until the decision of Cage's suit, and she asks for such reduction of the price as she should be entitled to when the amount of deficiency should be determined.

The Court below deemed it unnecessary to examine the second ground of defense, as the plaintiff in the Cage suit had himself dismissed it in open court, and we shall therefore merely examine the first ground:

The sale to the defendant is evidently one *per aversionem*, and in such sales there can be no claim for a disagreement in measure. Civil Code 2471, 850. *Curry v. Achinard*, 5 N. S. 243. 8 N. S. 160. 14 La. 497. 2 La. 502. 19 La. 423. 2 Rob. 357, and other authorities; besides this, it is contended by the seller that there is no warranty as to quantity.

Fraudulent concealment by the vendor, as to the real quantity, was not charged against him in the pleadings; but, it is urged in this Court, and a diminution of the price in consequence thereof, is claimed. Apart from the fact that the previous *mesne* conveyances represent a smaller front than that sold, there is nothing in the record to sustain the charge of fraudulent concealment or misstatement, on the part of the administrator. The whole chain of titles had been duly recorded, so that the variance complained of might have been readily ascertained.

The sale took place on the premises, and if the purchaser erred as to the exact measurement of the front line, and the superficial quantity contained in the tract, she could not have been deceived as to the boundaries to which her attention would have been naturally directed. See the case of *Curry v. Achinard*, 5 N. S. 212, 213.

This case bears no analogy to that relied on of *Lessassier v. Dashiell*, 13 La. 155, which was remanded to the lower Court to permit the purchaser to prove what was expressly charged, that the vendor knew before and at the time of the sale that the tract of land, known as the double concession, did not contain four hundred arpents, but less than ninety-three arpents and a fraction—but *before* and *at the time* of the sale, he assured the defendant that it contained four hundred arpents, or upwards.

That was a sale *per aversionem*, but the Court very properly held that good faith is required in sales of that description as much as in any other contract, and if the false representation attributed to the vendor could

be sustained, that he could not shelter himself behind the principle that the sale was one *per aversionem*, and that he was not liable to make up the deficiency.

The Court below considered the clause in the conveyance now before us as one of non-warranty as to quantity; but as we deem the sale to be one coming unqualifiedly within Article 2471 of the Civil Code, it is unnecessary for us to determine what effect should be given to that term of the sale.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be and the same is hereby affirmed, at the costs of the appellant.

No. 1231.—HIRAM TURNAGE *c.* WILLIAM WELLS and B. B. LOCKHART.

A verbal contract, amounting to over five hundred dollars, must be proved by at least one credible witness and corroborating circumstances. C. C. 2257.

When two parties enter into a contract with a third, and neither a commercial partnership nor a solidary obligation is shown, judgment cannot be rendered *in solido*.

**A** PPEAL from the District Court, Parish of Livingston, *Ellis, J.*  
*Duncan & Davidson*, for plaintiff and appellee. *Marr & Foute*, for defendants and appellants.

**LESLEY, J.** The plaintiff claims from the defendants, *in solido*, the sum of nine hundred and eighty-six dollars and twenty-five cents, as the price of four bales of cotton, alleged to have been sold and delivered to them by the plaintiff's agent, in the year 1864.

The defendants answered separately—both pleaded the general issue, and Lockhart denied any partnership with Wells in the purchase of the cotton.

The case was submitted twice to a jury, who found a verdict each time in favor of the plaintiff, and, after an ineffectual effort to obtain a new trial from the last verdict, the defendants appealed from the judgment rendered upon it.

It is admitted by the plaintiff and appellee that the contract is a verbal one, and that the action is brought under Article 2257 of the Civil Code, which provides "that contracts or agreements relative to personal property, above five hundred dollars in value, must be proved at least by one credible witness and other corroborating circumstances."

The only witness produced by the plaintiff to prove the sale of the cotton was the plaintiff's agent, who says that he made it. His testimony was sustained by corroborating circumstances, which the jury thought, and which we think, sufficed to establish it, and we should not have disturbed their verdict had they not condemned the defendants *in solido* to pay the price, when neither a commercial partnership nor any solidary obligations, on their part, was shown, and which cannot be presumed.  
 2088 C. C.



Turnage v. Wells et al.

It is therefore ordered, adjudged and decreed, that the verdict of the jury be set aside, and the judgment of the Court below be annulled, avoided and reversed.

It is further ordered, adjudged and decreed, that judgment be and it is hereby rendered in favor of Hiram Turnage, and against the defendants, William Wells and Benjamin B. Lockhart, jointly, for the sum of nine hundred and eighty-seven dollars and seventy-five cents, with five per cent interest for one year, the costs of the lower Court to be paid by the defendants and appellants, and those of the appeal by the plaintiff and appellee.

No. 1319.—JOHN MCKOWEN *v.* L. G. ATKINSON et als.

Where judgment was signed in the February term, and an appeal was taken at the May term following, and the appellee not cited, the appeal will be dismissed. Citation is essential.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J. Cross & Hardee*, for plaintiff and appellee. *McVea & Hunter*, for defendants and appellants.

HOWELL, J. The judgment in this case was rendered in the February term of the District Court for the parish of East Feliciana, and at the May term following, two of the defendants presented a petition for and obtained an order of appeal, without praying for a citation, and no citation was issued or served.

Only one of the defendants gave bond, which is in favor of plaintiff alone, who has filed a motion in this Court, after the three judicial days following the return day, to dismiss the appeal on the ground of want of citation.

We cannot refuse the motion, under the circumstances. The appellee, not having been cited, was not notified of the day on which he should appear to answer the appeal. Citation is essential. 16 L. 50. 5 A. 115. 10 A. 650. 9 R. 2.

It is therefore ordered that the appeal be dismissed, with costs.

No. 1259.—MARGARET A. LURTY *v.* JULIUS A. SKILTON.

A residence in this State of one year is not required in order to protect defendant's property from attachment.

**A** PPEAL from the District Court, Parish of East Feliciana, *Cooley, J. Collins & Leake*, for plaintiff and appellant. *Wickliffe & Miller*, for defendant and appellee.

HYMAN, C. J. In this case the plaintiff sued out a writ of attachment, and procured the attachment of some of defendant's property.

Larty v. Skilton.

The grounds alleged to obtain the writ was that defendant was indebted to plaintiff, and was a resident of the State of Mississippi.

The defendant moved to have dissolved the writ of attachment, and asked judgment against plaintiff for the damages caused to him by the illegal attachment of his property.

The District Judge set aside the attachment, but refused judgment in favor of defendant for damages.

From the judgment of the District Judge, the plaintiff has appealed.

One of the grounds of defendant's motion to have dissolved the attachment was, that he resided in the State of Louisiana.

The evidence proves that defendant was living in New Orleans at the time this suit was instituted, and had been living in said city for more than two years previous thereto; but plaintiff contends that as he was a surgeon in the United States army, the mere fact of his residing in the State did not show his intention to change his former residence, which was in another State. This may be true, but there is evidence that his connection with the army had ceased ten months previous to the bringing of this suit.

We consider that defendant's residing in the State for ten months destroyed the right of his creditor to attach his property, as that of a debtor residing out of the State.

A residence of a year in this State is not required to protect a defendant's property from attachment, under the second paragraph of the 240th Article of the Code of Practice.

The defendant has neglected to answer the appeal, and therefore it is needless to examine whether the judgment of the lower Court be correct on the claim for damages. C. P. 888 and 890.

Judgment of the District Court is affirmed.

#### No. 1296.—ROBINSON G. COTTON v. MARY C. STIRLING et al.

Where a judgment has been rendered by the lower Court against two defendants *in solido*, and only one of the defendants is mentioned in the appeal bond, the appeal will be dismissed.

**A**PPEAL from the District Court, Parish of West Feliciana, *Couley, J. Collins & Leake*, for plaintiff and appellee. *Wm. D. Winter*, for defendants and appellants.

**LABAUVE, J.** This case is before us, first, on a motion to dismiss the appeal, on the following ground :

That all the parties interested in maintaining or reversing said judgment are not parties to the appeal; judgment was rendered against Mary C. Stirling and William D. Winter, *in solido*, and both of them appealed.

This suit is brought by plaintiff against Mary C. Stirling and William D. Winter, upon their four notes, *in solido*, dated January 24th, 1863, amounting in all to \$16,000.

The District Court, after hearing the evidence, gave judgment for plaintiff against both defendants *in solido*, for the sum claimed.

Both defendants appealed by motion, from that judgment, to this Court.

Mrs. Mary C. Stirling alone, one of the appellants, filed a bond of appeal, as principal, and W. D. Winter and Chas. J. Johnson as sureties, in favor of Robinson G. Cotton, the plaintiff. It is then evident that William D. Winter, one of the judgment debtors *in solido*, is not before this Court, either as appellant or appellee, as his name does not figure in the bond in either capacity. Those only are parties to the appeal whose names are inserted in the bond. 12 R. 203. 10 A. 232. 11 A. 409. 12 A. 71. 13 A. 392, 441. 14 A. 315, 688.

It is settled that all parties interested that the judgment should remain undisturbed, must be made parties to the appeal or it will be dismissed. 16 L. 109. 3 R. 436. 5 R. 224. 9 R. 256. 12 R. 180, 203. 8 A. 367. 11 A. 674. 14 A. 315.

The question arises now, has W. D. Winter, who is decreed to pay *in solido* the whole amount, an interest in the maintaining of this judgment? As to him, we cannot touch that judgment, he not being a party before us.

This judgment, although rendered *in solido* in favor of the plaintiff, is of right divided between the two defendants, who, between themselves, are liable each only for his half. Civil Code, Art. 2099. 12 R. 183. So, in this case, if Winter pay the whole judgment, he can claim from his co-defendant one-half thereof (C. C. Art. 2100), and would be subrogated as surety to all the rights of the judgment creditor, for the recovery of that half against the appellant. Civil Code, Art. 2157, No. 3. 11 L. 52. 3 A. 66. 3 R. 299. 2 A. 427. If that judgment has been recorded, thereby creating a judicial mortgage on the real property of the appellant, Winter, on paying that judgment, would have the same mortgage securing the half due by said appellant.

We are of opinion that Winter has an interest in having the judgment appealed from affirmed; for, if it be reversed, the appellant is released from it, and Winter remains bound alone under it, without recourse on his co-obligor for his half. In *Gibson v. Selby*, 3 A. 317, the plaintiff in an injunction suit and his surety had been decreed to pay, *in solido*, interest and damages; the plaintiff alone appealed, without bringing before this Court his surety; the appeal was dismissed. In *Same v. Lefriere et al.*, 12 A. 757, a judgment was rendered *in solido* against two defendants, one of whom alone appealed, without making his co-defendant a party to the appeal, which was dismissed, for the reason that the defendant left out had an interest in maintaining the judgment appealed from.

We are of opinion that the motion to dismiss must prevail.

Appeal dismissed, at the costs of the appellant.

## No. 1313.—TIMOTHY H. CORCORAN v. THE SHERIFF et al.

Plaintiff enjoins a seizure under a writ of *fiery facias* on the ground that he is the owner and possessor of the property seized, and the judgment creditor, in answer to the injunction, avers that the act of sale on which plaintiff claims the property seized, is fraudulent and simulated: *Held*—That the party claiming the property is bound to make his title clear and certain by legal evidence. An act *sous seing price* has no date against third parties, except the one at which it is produced, unless the real date is shown by evidence  *dehors* the instrument

**A** PPEAL from the District Court, Parish of East Feliciana, Posey, J. Fuqua & Kilbourne and J. H. Muse, for plaintiff and appellee. McVea & Hunter, and Cross & Hardee, for defendants and appellants.

LSLEY, J. The defendants, in this injunction suit, W. B. Lacy and H. Reinberg, two of the judgment creditors of A. W. Ballard, had, by separate writs of *fiery facias*, caused to be seized on the plantation of their common debtor, and as his property, a lot of unginned cotton, when proceedings under the said writs were arrested by injunction at the instance of the plaintiff, Timothy H. Corcoran, who claimed to be the owner of the cotton seized by virtue of a purchase thereof from A. W. Ballard, made by him on the 28th June, 1865, and that his possession of it as well as his ownership thereof, were complete when the seizures were made.

These defendants, for answer to the plaintiff's petition, pleaded the general issue, and averred specially that the cotton seized under their writs was not at the time of the seizure in the possession of the plaintiff, no delivery thereof having been made to him by Ballard. That at the time of the pretended sale to the plaintiff and anterior thereto, Ballard was notoriously insolvent, of which the plaintiff was well aware; that he was absconding from his residence at the time, and that, besides the cotton seized, the plaintiff pretended to have purchased all the property of Ballard—and, finally, they say that the sale under which the plaintiff pretends to claim is a fraudulent simulation, and cannot have effect to defeat their executions.

The mandate of the injunction was granted on the 11th September, 1865, and the affidavit of the truth of the facts which rendered it necessary, was not made and filed until the 14th of that month. The Court erred in not maintaining the defendants' motion to dissolve the injunction on that ground, as the oath of the party applying for it was the essential basis of the mandate. Art. 304, C. P.

The case was submitted on its merits to a jury, who rendered a verdict in favor of the plaintiff, and from the judgment of the Court thereupon, the defendants, after an ineffectual effort to obtain a new trial, appealed.

On the trial of the case in the Court below the plaintiff, as proof of his title to the cotton, offered a paper of the following tenor, viz:

"For and in consideration of the sum of four thousand dollars, cash in hand paid, the receipt acknowledged, I have bargained, sold and delivered to Timothy H. Corcoran, all the cotton I have on my plantation in the parish of East Feliciana, estimated at sixty bales, being in the seed.

The purchaser to superintend the ginning and hauling. In witness whereof, I have this day and date signed this writing and act of sale.

Baton Rouge, June 28th, 1865.

A. W. BALLARD."

This paper was objected to as having no date against the defendants, but the Court received it, allowing the plaintiff the privilege of fixing a date certain to it. This paper, and the evidence of a witness, G. W. Smith, is the proof mainly relied upon to establish the sale of the cotton from Ballard to Corcoran. The paper is the title upon which he founds his claim to it, and all that Smith says in this connection, is in answer to the second interrogatory propounded to him by the plaintiff. He says: "I was employed by J. H. Corcoran to gin, bale and haul off a lot of cotton bought, as I understood, by him from Mr. A. W. Ballard. The cotton was in East Feliciana."

Not the slightest allusion is made anywhere else in the record, either to the sale or to the paper purporting to bear the date of the 11th June, 1865, unless it be in the testimony of a witness named Bauchamp, who was the neighbor of Ballard, and had been the agent of himself and wife during their absence, and he says that he knew nothing of any sale of cotton to plaintiff until about the time the cotton was seized, which was sometime in September following, 1865."

Applying, then, to this case, the well known rule of evidence, that an act *sous seing privé* has no date against third persons, except that at which it is purchased, unless the real date be proved by evidence *dehors* the instrument. See 1 Hen. Dig. 600, §§ 6, 8. In the absence in this case of any other evidence *aliunde*, the act *sous seing privé* cannot be deemed proof of title to the cotton in Corcoran, to affect the defendants' seizures.

It was incumbent on the plaintiff to make his claim to the cotton certain, and this he failed to do, unless the vague statement of the witness, Smith, that the sale had been made, as he understood of Corcoran, establishes the fact which, particularly, under the circumstances of this case, we do not think it does—as it might, if real, have been shown beyond a doubt.

When the sheriff seized the cotton, there was no apparent adverse possession of it in Corcoran or his agent, but, assuming that Smith had had the possession of it for Corcoran, it was an unjustifiable and illegal possession, and either Ballard or his creditors, under their writs of *fi ei facias* might have taken the possession of it, to which they had the legal right, out of his hands, provided no violence was used. See *Wells v. Wells*, 8 N. S. 311.

No objection to or protestation against the seizure made by the sheriff, seems to have been made at the time thereof, either by Corcoran or Smith.

The plaintiff's success in the present case, where so many circumstances concur to render such a transaction suspicious, depended on his showing at least satisfactorily a transfer and delivery of the cotton, but this he failed to do.

It is therefore ordered, adjudged and decreed, that the verdict of the jury be set aside, and the judgment of the Court below annulled, avoided and reversed.

It is further ordered that the injunction sued out by Timothy H. Corcoran be dismissed, and his suit dismissed, with costs in both courts.



No. 1302.—JOHN J. HUTCHINSON *v.* A. J. JOHNSON.

All the parties interested that a judgment shall remain undisturbed, must be made parties to any appeal taken from it, or the appeal will be dismissed: and this rule applies to warrantors interested in the suit.

**A**PPEAL from the District Court, Parish of St. Helena, *Ellis, J.*  
*J. E. Wilson*, for plaintiff and appellee. *T. C. W. Ellis*, for defendant and appellant.

HYMAN, C. J. Plaintiff brought a petitory action against defendant to recover a certain tract of land in the parish of St. Helena, in defendant's possession.

Defendant called in warranty Caroline G. Ridgely, his vendor, who, in turn, called in warranty her vendor, B. F. Taylor.

Judgment was rendered decreeing that plaintiff recover from defendant the land; that defendant recover of his vendor, Mrs. Ridgely, the price he paid her for the land, and that her right of action for warranty against her vendor, B. F. Taylor, be reserved.

From this judgment defendant appealed, and gave his appeal bond in favor of plaintiff alone.

B. F. Taylor is interested that the judgment should remain undisturbed—without the appeal bond being in his favor, he is not a party to the appeal, and all parties interested that the judgment appealed from should remain undisturbed, must be made parties to the appeal. 12 Rob. 203.

Let the appeal be dismissed.

No. 1306.—EDWARD RICKS *v.* AUGUSTE BERNSTEIN.

In proceedings *in execution* the creditor must bring himself within the letter of the law.

Where a discrepancy exists between the note and the act of mortgage by which it is secured, the holder cannot proceed by executory process.

**A**PPEAL from the District Court, Parish of St. Helena, *Ellis, J.*  
*D. N. Hennen*, for plaintiff and appellant. *Ernest Wenck and J. J. Ellis*, for defendant and appellee.

ILSLEY, J. The plaintiff in injunction stayed proceedings under the executory process, sued out against him by the defendant.

The ground urged for the injunction was, that there was a discrepancy between the note sued on and the one described in the authentic act of mortgage, upon which the order of seizure and sale was granted, in this, that the first bore interest at eight per cent. from its date, whilst the one described only bore that rate of interest from its maturity, and that there was no identity between the note and the act. This is evident. But the Court below, although satisfied that the note did not correspond with the act, and upon the admission of the plaintiff, remitted one year's interest,

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yet dissolved the injunction, with ten per cent. damages on the amount enjoined.

It is probable there was an error in the drawing of the note ; but in a proceeding *via executiva*, nothing can be left to conjecture. 1 Hen. Dig. p. 646, § 1.

Every fact must be patent upon the face of the papers, and if there is any matter *in pais*, some other proceeding than one *via executiva* must be resorted to, to prove it. In the present case there is a want of identity between the note annexed to the petition and that described in the authentic act ; and the Judge erred in granting the order.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the injunction sued out be perpetuated, at the costs of the appellee.

No. 1273.—THE STATE OF LOUISIANA *v.* FERDINAND WHITAKER.

A justice of the peace, before whom a party is brought for examination, cannot admit him to bail if the crime of which he is accused be punishable with death, or with seven years' or more imprisonment at hard labor. Revised Statutes, 148-9, sec. 82.

A bail bond taken by a justice of the peace, in a case in which he is prohibited from admitting the party to bail, is void ; and the securities thereon will incur no liability.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J.*  
*R. W. Knickerbocker*, District Attorney, for the State. *W. F. Kernan*, for defendant.

LSLEY, J. The appellant was the security on a bond taken and approved by a justice of the peace, conditioned for the appearance of the principal obligor, *Ferdinand Whitaker*, at the District Court, Parish of East Feliciana, for *embezzlement*—a crime punishable with seven years' imprisonment at hard labor. (See Revised Statutes, 148-9, § 82.)

In the cases of the *State v. Hebert*, 10 Rob. 41, and the *State v. Harper*, 3 An. 598, and the *State v. Hays*, 4 An. 59, it was held that justices of the peace are incompetent to grant bail when the offense is punishable with death, or imprisonment at hard labor for seven years or more, and that bonds taken by them, in such cases, for the appearance of parties, are void, being in contravention of a prohibitory law. (See Act of 3d May, 1805; Bull. & Cur. Dig. 529; Act 31st March, 1807; Bull. & Curr. Dig. 530; Session Acts, p. 448, sec. 43.) The party who signed the bond incurred thereby no legal liability.

The judgment of the District Court must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that judgment be and it is hereby rendered in favor of the appellant, without costs.

No. 1282.—GLEASON & McMANUS *v.* THE SHERIFF *et al.*s.

Where property of a judgment debtor has been seized by virtue of executions in several cases, and a third party enjoins the proceeds of the sale in the hands of the sheriff on the ground that he has a superior privilege on the property seized: *Held*—That on third opponent showing a superior privilege, the seizing creditors can only claim the residue after paying opponent's claim.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J.*  
*W. F. Kernan*, for plaintiff. *McVea & Hunter*, and *Fuqua & Kilbourne*, for defendants.

**LSLEY, J.** Several of the creditors of John F. McGinn had issued executions in the judgments which they had respectively obtained against their debtor, and, in virtue thereof, the sheriff, on the 4th December, 1860, levied on a stock of goods.

Subsequently, on the 20th March, 1861, the plaintiffs, third opponents, caused to be stayed in the sheriff's hands the proceeds of John F. McGinn's stock of goods, out of which they claimed to be paid the amount due them, say six hundred and ninety-seven dollars, for which they held the lessor's pledge, and claimed to be paid therefrom the amount due them by privilege and preference.

After trial in the Court below, the claim of the third opponents was sustained according to the prayer of the petition, and the balance, if any, of the proceeds of sale was ordered to be paid to the seizing creditors in the order and rank of their seizures.

From this judgment the defendants have appealed.

A very careful examination of the record satisfies us that there is no error in the judgment of the District Court.

No objection seems to have been made to the introduction, as evidence in the trial, of the opponents' judgment against the common debtor, John F. McGinn, by which their privilege was recognized on the goods seized by virtue of the several *feri facias* sued out by the defendants. This judgment not having been attacked for fraud and collusion, is *prima facie* evidence against third parties. *Judson v. Connolly*, 5 An. 401. *Fox v. Fox*, 4 An. 135. 17 La. 205. 15 La. 59. *Adams v. His Creditors*, 14 La. 459; and there is no evidence in the record to disprove the validity of the opponents' claim and privilege, which is superior to those of the seizing creditors.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellants.

No. 1235.—THE STATE OF LOUISIANA *v.* THOMAS J. FRISBY.

After the jury have received the charge of the Judge, in a capital case, and have retired, the Judge is not authorized to give separate and private instructions to any of the jurors. If they desire further instruction, he should order all to be brought into Court, and there instruct them in presence of the counsel.

**A** PPEAL from the District Court, Parish of Tensas, *Farrar, J.*  
*A. J. Herron*, Attorney General, for State. *Farrar & Reeves*, for defendant and appellant.

LABAUVE, J. The accused was convicted of manslaughter, and sentenced to ten years' penitentiary and hard labor at Baton Rouge.

He took this appeal.

After the verdict of the jury, the accused, by his counsel, moved for a new trial, upon the following grounds, among others :

"2. Because, after the jury had retired—after the closing of the evidence, argument of counsel and charge of the Court, to consider their verdict—one of the jurors impaneled in said case, viz : Isaac F. Harrison, separated from said jury, returned alone to the court-room and had a *private conversation* with the Judge on the bench, relative to said cause, apart from and out of the presence of the jury, and out of the hearing of the defendant or his counsel, and without their consent and against their will. All of which defendant contends, respectfully, vitiates said verdict and entitles him to a new trial."

The record shows, beyond a doubt, by the testimony and statement of the then presiding Judge Farrar, and Isaac F. Harrison, the juror, that, after the trial, closing of the evidence, argument of counsel and charge of the Court, and the jury having retired to their room to deliberate, the said Isaac F. Harrison, one of the said jury, left the room in company of the sheriff and returned, without the rest of the jury, to the court-room, and had a conversation with the Judge, and asked for instructions, whether the jury could attach to their verdict a recommendation for mercy. That this conversation was not loud, in order not to interrupt the proceedings of the Court, and it was believed by said juror that the members of the bar or the prisoner could not hear it; the Court was in session; that the Judge's instructions or reply to this juror, was that *it was perfectly competent for them to attach to their verdict a recommendation to the Court for mercy in behalf of the prisoner.*

The question of law which arises here, is : After the jury have received the charge of the Judge and retired for deliberation, is he authorized, by law and universal practice in conducting criminal proceedings in trials of capital cases, to give to jurors separate and private instructions or charges, out of the hearing and without the knowledge of counsel on both sides? We think not. Because the instructions might be improper and illegal, and neither party could have an opportunity to except to such instructions. When the arguments are closed, the Judge gives his charge to the jury in presence of counsel on both sides; either party then has the right to except to any part of the charge; and after the jury have retired, if they desire any further instructions, at their request, the Judge orders them all to be brought into Court, and there, in presence of counsel, the Judge may give them the instructions desired, counsel, of course, having the right to except.

In the present case, the Judge's instruction was not improper in itself, and no exception could have been taken if given to the whole jury in the usual way, in presence of counsel. The objection here is not to the illegality of the instruction *per se*, but to the manner, time and place of giving the same. Had the Judge legal authority to give instructions, as was done in the case at bar, great mischief and injustice might be done, without leaving to the accused or the State the remedy, by bill of exception, to have the errors of the Judge brought up and corrected before this Court.

State of Louisiana v. Frisby.

The statement of the Judge, found in the record and not excepted to, establishes clearly that "Col. I. F. Harrison, one of the jurors in this case, came to him during the sessions of the Court, stating that he had come under the charge of the sheriff, at the request of the jury, who had found their verdict, to inquire of the Court whether it was competent for the jury to attach to that verdict a recommendation to the Court for mercy in behalf of the prisoner; that he had replied to him, it was perfectly competent for them so to do." \* \* \*

The fact, then, was admitted and placed on record, without objection, and it is now before us, and there can be no contest as to its existence, leaving for our decision the question of law alone: Was the Judge authorized, by law governing criminal proceedings in trials of capital cases, to give instructions in the manner, time and place as stated?

We are clearly of opinion that the criminal law does not sanction such proceedings, and that the District Court erred, and should have granted a new trial.

It is therefore ordered and decreed, that the verdict of the jury, and the judgment of the Court rendered thereupon, be annulled and avoided, and that the case be remanded for a new trial and proceeded in according to law.

## No. 1264.—STATE OF LOUISIANA v. NEWTON TAYLOR et als.

Where an appearance bond is not signed by the accused, he is not bound thereon; and a judgment against the surety is not valid.

**A** PPEAL from the District Court, Parish of Livingston, *Jones, J.*  
*Attorney General, for the State. Wilson & Amacker, for defendants.*

HYMAN, C. J. In this case there was a judgment rendered in favor of the State against Herod Allen, as security on a bond for the appearance of Newton Taylor, at the Sixth Judicial District Court, parish of Livingston.

The bond was not signed by Taylor, nor is he bound thereon. Allen has appealed from the judgment.

There cannot be an accessory obligation without a principal one.

Let the judgment against Herod Allen, in favor of the State of Louisiana be annulled, avoided and reversed, and let there be judgment in his favor.

## No. 1251.—STATE OF LOUISIANA v. FERDINAND COLLINS.

Where a party has been arrested in one parish, charged with an offense committed in another, it is the duty of the magistrate to commit him to prison until he can be transferred to the parish where the offense is alleged to have been committed, and a bond taken by the magistrate whereby the party is released from prison, is unauthorized and void, and the sureties cannot be held. Revised Statutes, page 167, § 49.

**A** PPEAL from the District Court, Parish of East Baton Rouge, *Posey, J.*  
*J. J. Stafford, District Attorney, for State. James O. Fuqua, for defendant and appellant.*



TALIAFERRO, J. In September, 1866, the defendant was arrested in the parish of East Baton Rouge on the charge of having stolen at Clinton, in the parish of East Feliciana, a horse, the property of H. L. Latil. The magistrate, before whom the accused was examined, required him to furnish a bond in the sum of five hundred dollars, with a sufficient surety or sureties, or in default thereof to be imprisoned. Clark Shelvin, the appellant in this case, became surety for the accused, and executed with him the required bond, which was conditioned that the defendant should appear in the District Court of the Fifth Judicial District, at its next sitting, in and for the parish of East Baton Rouge, on the first Monday of November, 1866, to answer the charge preferred against him. The defendant failed to appear according to the tenor of the bond, and the District Attorney moved for an order of the Court declaring a forfeiture of the bond. Shelvin, the surety, filed an answer to the motion, alleging the following objections to the rendition of the order:

1. That there was no order rendered by the committing magistrate, or any other competent officer, admitting the accused to bail or fixing the amount of the bond.

2. That the magistrate was without authority to admit the party to bail, as it appears from the bond that the offense charged was committed in the parish of East Feliciana.

Although, in the matter charged against him, the accused may, in the general acceptance of what constitutes the crime of larceny, have been guilty of that offense in the parish of East Baton Rouge as well as in the parish of East Feliciana, and therefore indictable in the former parish, yet, a statute of the State founded in motives of public interest and convenience, directs that in cases of this kind "the offender shall be committed to prison until he can be transferred to the parish where the offense is alleged to have been committed." Revised Statutes, page 167, section 45.

The committing magistrate erred in not following the statute, and the bond taken was therefore unauthorized.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered, that the defendant and appellant have judgment in his favor, relieving him from all obligation on the bond sued upon.

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No. 1300.—L. P. WASHINGTON P. ORAN HACKETT.

To make a judgment rendered against the husband and wife valid, the wife must be authorized by the husband or the judge to appear and defend the suit.

When no judgment by default has been taken, prior to rendering a final judgment, it is a nullity, and will be so declared when attacked by a third party.

**A** PPEAL from the District Court, Parish of Livingston, *Ellis, J.*  
*Wilson & Pipkin*, for plaintiff and appellant. *T. G. Davidson and T. G. W. Ellis*, for defendant and appellee.

Washington v. Hackett.

HOWELL, J. This is an action to annul a judgment rendered in the District Court for the parish of Livingston, against the plaintiff and her husband in the suit of *O. Hackett v. J. G. Washington et al.* The grounds of nullity are that, plaintiff was not authorized by her husband or the Court to defend said suit; that the law prohibits her being held liable *in solido* with her husband for the debt on which said suit was based, and that she is not liable therefor indirectly or otherwise, nor is her separate property responsible for the same.

The defense is a general denial, and the averment that the judgment is legal, the plaintiff having been joined with her husband, and both having made default. Judgment was rendered in favor of defendant, and plaintiff appealed.

In the suit of *Hackett v. Washington and Wife*, both defendants were cited, but failing to appear, the interrogatories on facts and articles, propounded to them to prove the correctness of the account sued on and the liability of the wife, were taken as confessed, and at the same time judgment was rendered against them *in solido*. We are unable to find in the record any evidence of a judgment by default having been rendered prior to the final judgment; nor is there any authorization of the wife by her husband or the Court to defend the suit. No valid judgment could be rendered against her under such circumstances, not being qualified to appear in the suit. C. C. 123, 126. C. P. 118, 606.

It is therefore ordered, that the judgment appealed from be reversed; and it is now ordered that there be judgment in favor of plaintiff and against the defendant, annulling the judgment against the plaintiff herein, Mrs. L. P. Washington, in the suit of *O. Hackett v. J. G. Washington et al.*, No. 604, on the docket of the District Court for the parish of Livingston, and that defendants pay costs in both suits.

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No. 1268.—JAMES SYME v. BROWN et als.

Where several parties endorse a promissory note, they are not joint sureties to the holder, but each one is severally liable to him for the whole amount.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J. McVea & Hunter*, for plaintiff and appellee. *J. McVea*, for defendant.

TALIAFERRO, J. This is an action against A. Porter Brown, the maker, and Madison Marsh and B. M. G. Brown, the endorsers of two promissory notes—the one for \$500, the other for \$1,000, with interest. The plaintiff is holder under the endorsement of Marsh, the payee.

The defense first set up by B. M. G. Brown was, that as the note was not protested at maturity, he has lost his recourse upon Marsh, and is therefore discharged. He then, by exception, put in the plea of division, alleging that he is merely a surety endorser.

Judgment was rendered against the maker and B. M. G. Brown, *in solido*, for the amount of both notes.

B. M. G. Brown appealed.

Syme v. Brown et als.

The defense is clearly untenable. The obligation of the defendant is not that of a joint surety. "If several persons endorse a note, they are not joint sureties to the holder, but each one is severally liable to him." Bailey on Bills, p. 151.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both Courts.

No. 1322.—T. W. CHAMPLIN *τ.* MRS. ELIZABETH LEE and her Husband.

Plaintiff brings suit against a married woman, on a promissory note, alleged to be given for her own benefit, and joins her husband in the suit. A judgment by default having been set aside, the wife alone filed an answer. No steps were taken to have her authorized to appear in Court :  
*Held*—That her appearance being unauthorized, the judgment must be reversed. C. C. 123.

**A**PPPEAL from the District Court, Parish of St. Helena, *Martin, J.*  
*W. C. Pipkin*, for plaintiff and appellee. *T. C. W. Ellis* and *Bradley*, for defendant and appellant.

**LABAUVE, J.** This suit is brought against Mrs. Elizabeth Lee, upon a note alleged to have been executed by her for her own benefit and in her own affairs, and under the authority of her husband, Renny Lee, who is made a defendant in order to authorize and assist his wife herein, and on his failing to do so, plaintiff prays that she be authorized by the Court.

Judgment was rendered below against the wife, and she appealed.

The record shows that the defendants failing to answer, a judgment by default was rendered against them.

Immediately following, we find this entry :

"Ordered, that the default herein be set aside, and *Renny Lee et als.*, defendants, have leave to file their answer."

The entries and setting aside of default are not dated.

On the 13th of November, 1866, Mrs. Elizabeth Lee, the wife, appeared alone and filed an answer ; nothing in the record shows that she was authorized by her husband or by the Court. The question arises whether she was authorized to appear after the default, under the authority in 9 An. 197, where the suit was brought against the wife, and her husband was cited with her, and a judgment by default was entered and made final, without appearance ; there, this Court said, that the tacit issue was binding upon the wife, and dispensed with authorization of the Judge. In the case at bar, the judgment by default being set aside, carried with it the tacit issue and authority ; there was, then, no default when the wife answered.

But the case in 1 A. 260, *Adle v. Anty and Husband*, is exactly in point. The suit was brought against the wife joining her husband ; a judgment by default, taken against both defendants, having been set aside, the wife alone filed an answer ; no steps taken to have her authorized to appear in Court ; it was decided that she was not authorized. See also 6 R. 78 ; 9 R. 193 ; 3 A. 619 ; 10 A. 412 ; 12 A. 146. We are of opinion that the wife was not authorized to appear, and that the judgment rendered against her must be reversed.

Champlin v. Lee et al.

This want of authority has not been brought to our notice by the parties, but as such proceedings are absolutely null, we feel bound, *ex officio*, to notice such radical omissions and give parties a chance to correct them. *Robinson v. Butler*, 6 R. 78.

It is therefore ordered and decreed, that the judgment appealed from be reversed and annulled, and that the case be remanded for further proceedings according to law, and that the plaintiff and appellee pay costs of appeal.

No. 1193.—H. VIALA et als. v. EUGENE D. BURGUIERES.

The action of the minor against his tutor, respecting the acts of the tutorship, is prescribed by four years, to begin from the day of his majority. C. C. Art. 356.

The omission of the tutor to render an account of his tutorship, does not prevent prescription from running, and judgment creditors may avail themselves of it.

Prescription, in regard to claims which the heir may have against the succession, runs against himself, so long as he has not accepted the succession with the benefit of an inventory, and his acceptance as beneficiary heir cannot destroy prescription thus acquired against him during the interval of the opening of the succession. C. C. 3492, 3493.

**A** PPEAL from the District Court, Parish of Terrebonne, *Gates, J.*  
*Bush & Goode*, for plaintiffs. *Johnson, Berault, Denis and Legendre*, for defendants.

ISLEY, J. The plaintiffs, Louise Irma Thibodaux, Laura Thibodaux, wife of Eugene N. Dutreil, and the three minor children of Julie Thibodaux, represented by their father and natural tutor, Hypolite Viala, claim to be creditors of the succession of their father, H. M. Thibodaux, in the sum of fifteen thousand nine hundred and sixty-five dollars and twenty-cents, their inheritance from their mother, Louise Ruhé, who died May 21st, 1847, while her said children were minors and which amount having been, as they aver, received for them by their father and natural and confirmed tutor, they now claim from his succession, with legal interest from their respective majorities, with a legal mortgage on the property of their father's estate, to the extent of the principal and interest of the sum demanded. In order, however, to sustain their present demand, the plaintiffs must first succeed in setting aside and annulling certain acts in the shape of acquittances and releases of mortgage, given by themselves to their father and tutor in his lifetime, and this is mainly the object of this suit. The petition accordingly sets forth as follows: The valuation of the property depending in the community of the father and mother, as shown by the inventory made soon after her death, and the adjudication of the minors' share of it to the father; also, the sums brought in marriage by the spouses, respectively.

That on the 2d October, 1850, the father had presented to the Court an account liquidating the community, which was apparently much indebted, but showing, nevertheless, a balance accruing to the minors of \$10,793.

That this account was homologated on the 13th November, 1850, after the rejection of a single item, by which the aforesaid balance was increased to \$10,965 50.

That on the 31st of March, 1857, by notarial act, the three daughters, Irma and Julie, as well as Laura, already wife of Dutreil, and by him authorized and assisted in the act, declared themselves of lawful age; acknowledged that an account of their maternal inheritance had been rendered by their father and homologated more than ten days previously in the suit No. 699 of the docket of the District Court of Terrebonne, and that they have examined the said account and vouchers, and found the same correct; that they approved and satisfied the homologation of it; that according to it the sum coming to them was \$10,793 or \$3,597 60 to each.

They further say that, whereas they have for the security of it a special mortgage on certain property of their father, which they describe, they desire to release that mortgage; and their father, also appearing in the act, declares that in consideration of that release, he gives his children another mortgage on other property described in the act, to secure the aforesaid balance still due them. Before doing this act, the parties also declare that by the judgment of homologation of the account above mentioned, the sum due the minors had been erroneously fixed at \$10,965 50, and authorize its reduction to the true amount of \$10,793.

That by another act of the 10th April, 1857, the same parties again appeared, and reciting once again that pursuant to the account rendered by their father and tutor in suit No. 699 of the District Court of Terrebonne, the balance in their favor was \$10,793, but that it had been by the decree of homologation of said account increased to \$10,965 50; they covenant and agree that the former is the true amount, and they then declare that they have each that day received from their father the sum of \$3,597 60, accruing to each, and in consideration of that payment they grant full acquittance of all dues and release of mortgage.

The petition then avers the amount above mentioned to be erroneous, and the judgment of homologation to be only provisional, and not conclusive upon the minors; and, particularly, that the account was not properly supported by vouchers; also, that the acts of 31st March and 10th April are null, for this:

1. Non-compliance with formalities prescribed by C. C. Art. 355, by reason whereof the minors had no knowledge of the true state of their accounts with their tutor.

2. That no money was ever paid as stated in the said acts.

3. That *Julie* was still a minor when these acts were executed; and that Mrs. Dutreil, though emancipated by marriage, was still under age at the time, and could only bind herself to the extent of one year's income.

It is by a proposed rejection of certain items of the tutor's account, rendered in the suit No. 699, and homologated by the decree of 2d November, 1850, that the petition assumes to raise the balance due to \$15,965 25 instead of \$10,793, and it concludes by asking that the amount be thus established anew; the acts of 31st March and 10th April, 1857, be annulled, and the plaintiffs recognized as creditors for that sum, with interest, and the tacit legal mortgage on all the property of the estate.

The administrator, by his answer, resists all the plaintiffs' pretensions, and insists on the correctness and validity of the amounts and costs attacked, it opposes to the claims of the plaintiffs the prescription of four



and five years, and, finally, sets up in reduction of any amount they might recover, certain sums of money advanced them by himself out of the estate now largely insolvent, at a time when it was not suspected of being so.

The intervenors, Perry, in his own right and as syndic of the creditors of Lobit & Charpentier, and Lobit & Charpentier, show themselves to be creditors of the estate of H. M. Thibodaux, for large amounts to secure which the deceased had given mortgages on the property left at his death and composing his estate.

They allege the insolvency of the estate, the appraised value of the property in its present condition being less than the amount claimed by the present plaintiffs. On these grounds the intervenors rest their right to come in and resist the claim of the plaintiffs, which they do by averring the binding force of the account and of the acts of the 31st March and 10th April, 1857, which the plaintiffs seek to annul and avoid.

They further plead, as does the representative of the estate, the prescription of four and five years as a complete bar to any such claims as those set up by the plaintiffs. After a trial contradictorily in the District Court, there was a judgment against the plaintiffs, rejecting their claim *in toto*. The judge *à quo* did not pass upon the question of prescription, but went into an examination of the merits, and saw in the evidence no ground to impugn the fairness of the settlement made by the plaintiffs with their father.

He was satisfied with the proofs of the satisfaction and payment of the plaintiffs' claims—proofs furnished by their own acts, viz: those of 31st March and 10th April, 1857, and an act of October, 1858.

The plea of prescription is earnestly relied upon in this Court, and as it is the first question in order, one which, if maintainable, will tend to put an end to the plaintiffs' action, it will be first examined.

The action of the minor against his tutor, respecting the acts of the tutorship is prescribed by four years, to begin from the day of his majority. Civil Code, Art. 356. *Gilbert v. Merriam*, 2 An. 162; *Bonnafanne v. Wells*, 10 An. 658; *Odile Gourdam v. Davenport*, 10 Rob. 174.

During that delay, the minor arrived at the age of majority may sue his tutor for an account of tutorship (*Cominargere v. Golly*, 6 La. 161); or he may sue to annul settlements made with his tutor not in strict accordance with the requisitions of law. C. C. 355. *Tutorship of Francis Hacket and another, minors*, 4 Rob. 297.

This prescription runs whether the tutor has rendered any account or not, and his entire omission to do so does not prevent the prescription from running. *Succession of McGill*, 6 An. 345. And judgment creditors can avail themselves of it. Civil Code, 3429. Pothier on Obligations, 700. Troplong on Prescription, 100, *et seq.* 6 An. 345.

Are the facts of this case such as to bring the plaintiffs within the scope of these authorities, and do they support the plea of the prescription of four years?

The family record of births and deaths, which the plaintiffs have themselves offered in evidence, explained by a witness, gives the ages respectively of *Louise Irma*, of *Laura*, and of *Julie Brigitte*.

*Louise Irma* was born on the 11th February, 1836. She, consequently,

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attained her majority on the 11th February, 1857, and she was of full age when the acts of 31st March and 10th April were passed.

Prescription was therefore acquired against her on the 11th February, 1861.

*Laura*, the wife of Dutreil, was emancipated by marriage when the acts attacked were executed, but prescription only commenced running against her from the day of her majority, or from the day on which she was dispensed by law with the time necessary to attain her majority, and this last event occurred on the 15th February, 1858. The time of prescription as to her would, therefore, if not suspended, expire on the 15th February, 1862. Her action was instituted on the 16th January, 1866.

One of the grounds assigned for a suspension of prescription against Mrs. Dutreil is, that on the 11th April, 1857, the day after the settlement between the tutors and the minors was made, the tutor executed his four promissory notes in favor of E. N. Dutreil, the husband of *Laura*, and that these notes were given in part representation of the amount due by the tutor to Mr. Dutreil's wife; that if Mrs. Dutreil had instituted this suit, the tutor would doubtless have claimed the cancellation of these notes, and thus the action of the wife would have been prejudicial to the husband; and such being the case, prescription did not run against her." See Civil Code, 3491.

There is no sufficient evidence in the record to connect the notes alluded to with that settlement. The proof furnished with that view is all of a negative and unsatisfactory character, and does not warrant the application of the Article of the Code relied upon.

The other grounds set up for the suspension of prescription will be presently adverted to.

*Julie* or *Brigette*, wife of *Viala* and the mother of his minor children, whom he represents in this suit, was born on the 25th May, 1837. She attained her majority on the 25th May, 1858, and she died on the 16th April, 1863. Prescription, unless suspended, was acquired against her on the 25th May, 1862.

No legal reason is shown in the record why *Laura* and *Julie* could not have prosecuted their present action within and up to the periods when prescription against each of them was completed.

It is, however, contended that, in any contingency, all prescription was suspended, and did not run against the plaintiffs, in consequence of the death of H. M. Thibodaux, their tutor, on the 5th March, 1861, less than four years after the settlement, and that they, having accepted his succession, with benefit of inventory, became his beneficiary heirs, against whom prescription does not run. See Art. 3492, § 1, Civil Code.

The succession of H. M. Thibodaux was so accepted by his children, the plaintiffs, in March, 1864; and it becomes necessary to interpret, for the first time, the paragraph of the Article of the Code referred to above, which provides that "prescription does not run against a beneficiary heir with respect to the debt due him by the estate."

Reading this Article in connection with Article 3493 C. C., which corresponds textually with Articles 2258 and 2259 of the Code Napoleon, and aided by the lights furnished by the Courts in France and the commentators of the latter Code, we are not embarrassed in reaching the conclu-

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sion that there is only a suspension of prescription, under Article 3429, in favor of beneficiary heirs, from the time of the express acceptance of a succession under the benefit of an inventory.

In the case of *Brulon v. Follett*, Journal du Palais for 1838, page 638, a decision was rendered, on a state of facts and of law, precisely analogous to that presented here, to the effect that "prescription in regard to claims which the heir may have against the succession, runs against himself so long as he has not accepted the succession with the benefit of an inventory, and his acceptance as beneficiary heir cannot destroy prescription thus acquired against him during the interval of the opening of the succession." See also *Moussard v. Valette et Bonnefond*, Journal du Palais 1849, vol. 2, 659. Troplong on Prescription, commenting on Articles 2258 and 2259 C. N., and Duranton on the same Articles, Nos. 316 and 322.

The plaintiffs are not included in any of the exceptions established by law to suspend the course of prescription against them.

Considering the plaintiffs' action prescribed, we have not examined any of the other questions presented by the pleadings.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be and the same is hereby affirmed, at the costs of the plaintiffs and appellants.

Nos. 880 and 885.—GEORGE S. LACEY *v.* WIDOW DAVIS LANAU, Tutrix.—  
A. LAVISSON *v.* SAME.

The under-tutor is not personally liable for expenses of litigation in a suit brought by him for the removal of the tutor, and in proceedings on opposition to the tutor's account of administration, unless he acted in bad faith.

Failure does not of itself prove bad faith.

The fees of counsel in such cases do not depend on success, and are to be paid by the estate of the minor.

**A** PPEAL from the Third District Court of New Orleans, *Fellows, J.*  
*E. W. Huntington*, for plaintiff and appellant. *C. Dufour* and *E. Bermudez*, for defendant and appellee.

HOWELL, J. These two suits are instituted to recover of defendant, as tutrix, the fees of counsel employed by the under-tutor, in an action to deprive the defendant of the tutorship and to oppose an account of her administration, filed by her under an order of Court, in both of which proceedings the under-tutor failed, except in an unimportant item of interest in the account.

The defense is, that the proceeding on the part of the under-tutor was indiscreet, unnecessary, and injurious to the minor's interests, and not being authorized to employ counsel, and their services not inuring to the advantage of the minor, he alone is personally responsible for such services.

It is not denied that, if the proceedings instituted by the under-tutor had been successful, the estate of the minor would have been liable for

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fees of counsel therein; and the question is presented, who is responsible for the fees, as the litigation has terminated in favor of the tutrix?

The law provides that the under-tutor may prosecute the removal of the tutor when the Judge shall think there is probable cause for removal, and permits the accounts of tutors to be homologated contradictorily with the under-tutor (see C. P. 1016; Acts 1855, p. 40), which necessitate the employment of counsel. 5 A. 165. We do not understand that the compensation of counsel in such cases depends on success; and, as the under-tutor receives no compensation and has no direct pecuniary interest in the result, we think he cannot be held liable in case of failure, unless, indeed, it appear that he acted in bad faith. His being unable to make the cause, which the Judge considered probable, a positive and successful one, does not of itself prove bad faith. And so in his inability to establish his opposition to an account. The proceedings in each case are under the eye of the Judge, who can easily detect any improper practice, and protect the interests of the minor and tutor by dismissal or otherwise. Great watchfulness, discretion and delicacy are to be exercised by Courts in such matters; and although the proceedings in question may have been unduly protracted and complicated, we do not consider them unwarranted or unauthorized on the part of the under-tutor, and we are of opinion that his counsel should be reasonably compensated.

Upon an examination of the questions properly involved in the pleadings, under the law applicable to such proceedings, the amount of legal skill and labor required, and the opinions of the two District Judges, before whom the proceedings were conducted, we have come to the conclusion that a fee of one thousand dollars each will be a fair and just reward to the plaintiffs, to be paid by the minor, now emancipated and made a party defendant.

It is therefore ordered, that the judgment of the lower Court be reversed, the verdict of the jury set aside, and it is now ordered that plaintiff recover of Amelia Rixner, a minor emancipated, the sum of \$1,000, with costs in both Courts.

[Same judgment in each case.]

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No. 271.—M. SIMON *v.* F. LEOPOLD.

The goods of a debtor being seized by his judgment creditor, upon premises leased by their owner to another party, and the landlord having intervened by third opposition, and had the goods provisionally seized for rent and the proceeds of sale being adjudged to him, the original judgment creditor has his remedy against the principal lessee for the amount of his judgment to the extent that the proceeds of the sale were applied to the extinguishment of the landlord's claim.

The defendant, having confessed judgment on the landlord's opposition, cannot afterwards maintain that he was not the real lessee.

**A**PPPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*V. F. & J. B. Cotton*, for plaintiff and appellant. *T. L. Lemly*, for defendant and appellee.

**TALIAFERRO, J.** In 1860, Simon & Frank, (whose assignee the present plaintiff is) having obtained a judgment against Charles Goldenberg,

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issued execution, and seized a stock of merchandise belonging to Goldenberg. The goods seized were in a house leased to the defendant in this case by C. M. Conrad. After the seizure, Conrad filed his third opposition, and obtained a provisional seizure of the same goods claiming to be paid by preference out of the proceeds of the sale (\$355) due him as lessor of the house in which the goods were found and seized. The entire proceeds of the sale (\$352 40) were appropriated to the lessor's claim, leaving nothing for the plaintiff's execution. The litigation arising from these matters, was before this Court in April, 1860, in the case of *Simon & Frank v. Charles Goldenberg; C. M. Conrad, Intervenor*, and is found reported in 15th Annual, p. 229.

In that case the Court said: "There is no doubt in our mind that the defendant Goldenberg, occupied at the time, the whole house leased as aforesaid by the third opponent to Leopold, and that the goods seized belonged to him; in fact a portion of said goods had by him been purchased from plaintiffs. The defendant, no doubt, for the purpose of defeating the claim of the plaintiffs, did not see fit to disclose the title under which he occupied the premises; for had it been as sub-lessee, the property seized would only have been subject to the privilege of the lessor to the extent of his indebtedness to the principal lessee. Civil Code, 2676. Whereas, under the interpretation given to the Articles 2675 and 2677 of the Code, the privilege covers all the movables seized to the full amount of the rent. 11 L. 499. 6 R. 293. The principal lessee is not before us in a more favorable light; for, having failed to show ownership in himself, he, nevertheless, suffered the proceeds of the sale to go to the extinguishment of his own debt. The peculiar circumstances of this case are such that we will make a reservation in favor of the plaintiffs in our decree."

The Court, accordingly, in its judgment decreed "that the rights of action of the plaintiffs, Simon & Frank, if any they have, to recover back the amount of the above judgment from Frederick Leopold, be reserved."

Soon after the decree was rendered the present suit was instituted by Simon, the assignee of the plaintiffs in the former suit against Leopold, the present defendant. The petition charges the defendant and Goldenberg with having formed a fraudulent combination to defeat the plaintiffs' claim against Goldenberg. The answer is a general denial. Judgment was rendered against the plaintiffs, and they have appealed.

Goldenberg, the defendant in the original suit we have referred to, and Leopold, the original lessee of the building in which Goldenberg's goods were found, were all, well as the original plaintiffs, made parties by the third opponent claiming the proceeds of the sale of the goods. Leopold and Goldenberg accepted service. The former admitted his indebtedness as alleged, and confessed judgment; the latter admitted the allegations to be true. Here then is the judicial confession of the defendant: that he owed the lessor the sum he claimed as due him on the lease; and we have seen that the stock of merchandise belonging to Goldenberg found on the leased premises, went to discharge *pro tanto* the rent due. Goldenberg seems easily to have acquiesced in the matter of having the proceeds of his merchandise seized by his creditors, appropriated to the payment



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of the lessor's privilege instead of being applied towards the payment of his own creditors.

The judge *a quo* was inclined to think Goldenberg the real lessee, as the leased premises seems to have been occupied by him during the whole period of the lease. Goldenberg, it is true, held from Conrad a written lease which expired in 1857, but prior to its expiration it was transferred to Leopold, and at its expiration it was verbally renewed to him until November, 1858. The amount claimed by the lessor, Leopold was obligated to him to pay, and having confessed judgment for it, he ought to be considered the real debtor. The evidence in the record before us tends still further to mystify the character of the relations that existed between the present defendant and Goldenberg, rather than to explain them; and we are left not free from doubt as to the fairness of their course towards the plaintiffs. We think, therefore, that the plaintiff should have judgment against the defendant for whatever portion of the proceeds of the merchandise seized under the plaintiff's execution, that was applied towards the payment of the superior claim of the lessor. Garcia, the agent of Conrad, the lessor, testifies that the claim for rent was fully satisfied; that he received of the whole amount (\$387 90) the sum of \$143 35 from Leopold, and the remainder being \$244 55, from the sheriff, under the decree of the Supreme Court rendered in April, 1860, in the case of *Simon & Frank v. Charles Goldenberg, C. M. Conrad, Intervenor*. 15th An. p. 229.

An exhibit of this settlement is appended to the evidence given by the agent. It bears date 25th January, 1861. The agent states that he received the money paid by the sheriff about a month previous to the payment by Leopold.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered, adjudged and decreed, that the plaintiff, M. Simon, in his representative capacity of assignee of Simon & Frank, recover from the defendant Frederick Leopold, the sum of two hundred and forty-four dollars and fifty-five cents, with five per cent. interest thereon from the 8th day of May, 1858; the defendant and appellee paying costs in both Courts.

HOWELL, J. recused.

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No. 873.—MRS. C. SHAW *v.* J. S. & R. E. NEAL.

Notice of protest deposited in the post-office at New Orleans, La., during the time it was in the possession of rebels in arms against the Government of the United States, addressed to an endorser residing in the town of Madison, Indiana, is no notice to the endorser, the mail service between the two places being interrupted by the war.

To bind the endorser, the holder should have sent the notice as soon as communication was opened between the two points.

In the absence of any proof, the Court will presume that the endorsement was made before hostilities commenced between the United States and a portion of her citizens engaged in armed rebellion against their government.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*Harrison & Hunton*, for plaintiff and appellee. *Eggleston & Hart*, for  
 defendants and appellants.

Shaw v. Neal.

HYMAN, C. J. Defendants are appellants from a judgment rendered against them as endorsers of a promissory note.

The note was dated at New Orleans, April 6th, 1861, and was made payable to the order of defendants at the counting-house of Messrs. Hillard, Summers & Co., in said city, on the 1st March, 1862.

It was endorsed by defendants. On its maturity it was presented for payment at the place where it was made payable, and was protested for non-payment.

The notary who protested the note put, on the day of its protest, a written notice of protest in the post-office at New Orleans, addressed to defendants at Madison, in the State of Indiana, their residence.

At the time of protest New Orleans was in the possession of rebels, and the post-office was under their control.

It was then impossible for mail communication to exist between New Orleans and Madison in Indiana, and the putting the notice of protest in the New Orleans post-office was a vain act.

No notice could reach defendants by thus depositing the notice.

To hold the endorsers bound, the plaintiff should have (as soon as communication was opened by the capture of New Orleans) sent notice of the dishonor of the note to them. There is no evidence that she has sent such notice.

Plaintiff assumed in argument, as if proved, that when defendants endorsed the note they were in territory occupied by rebels in war against the Government of the United States, and that they, before its maturity, removed from the territory so occupied to their residence, a part of the United States not in the possession of rebels; and she contends that, as defendants endorsed the note in a territory occupied by rebels, they should have remained therein to receive notice of its dishonor; and that they, not having done so, but having removed to a part of the United States where, by reason of the war, notice of the protest of the note at its maturity could not then be sent to them, are bound as if notice had been transmitted to them.

The note was made before there were hostilities between the government and its citizens, and it cannot be said that there was a war between rebels and government before hostilities commenced.

It is not proved when defendants endorsed the note—whether before or after hostilities commenced—and, without proof, we cannot presume that they endorsed it after the commencement of hostilities.

It will be proper to decide on the position assumed by plaintiff when facts are proved in a case that require an examination of the position.

It is decreed that the judgment rendered in this case by the District Court be annulled, avoided and reversed.

It is further decreed, that the suit be dismissed.

The plaintiff to pay all costs.

No. 1104.—J. B. & W. K. HUMPHREYS *v.* S. BROWNE and THOS. J. BURKE,  
Sheriff.

The order rendered on executory process is not such a judgment as will have the effect of the thing adjudged. *Res judicata* is not thereby established.

The military order, staying proceedings against the property advertised for sale, on the 21st January, 1866, when notified to the sheriff, put an end to that sale. It was an injunction issued by paramount authority, and the subsequent revocation of the order did not authorize the sale to be made without a new advertisement.

The fact that a person, whose property was being sold at judicial sale, was present at the sale and did not object thereto, is not a waiver of legal formalities.

A lease signed by an agent can have no effect as proof until the agency is shown by evidence of equal dignity.

**A** PPEAL from District Court, Parish of St. John the Baptist, *Beauvais, J. F. Filleul*, for plaintiffs and appellants. *Johnson, Denis, Berauld & Legendre, and Buchanan & Gilmore*, for defendants.

HOWELL, J. Plaintiffs sue to annul an order of seizure and sale issued against them and the sale, on the 4th November, 1865, of their property in pursuance thereof, to defendant Browne, on the grounds: 1. That the act of mortgage, having been passed before a notary who derived his authority from a rebel governor, cannot sustain the executory process. 2. That the consideration of the contract was Confederate treasury notes. 3. That the notice required by Article 735, C. P., is insufficient in not stating to whom and where the debt should be paid. 4. That one of the plaintiffs did not receive three days' notice as required by said article. 5. That no list or enumeration of the property seized was made by the sheriff and served on plaintiffs, or embraced in his return according to Arts. 654 and 702, C. P. 6. That the advertisements did not contain a full and correct description or enumeration of the different articles seized with the plantation. 7. That the return of the sheriff is false and fraudulent in not mentioning the suspension on the 27th October, 1865, of the sale advertised for the 4th November, 1865, by the order of Maj. Gen. Canby, by which all proceedings in any of the civil courts of the State, looking to the sale of said property, were stayed until 21st January, 1866, by reason of which unlawful acts, the defendant Browne, assisted by Burke, the sheriff, was enabled to buy for \$11,000 property worth over \$40,000, and got possession of articles on the plantation not seized and advertised, such as corn, wood, mules, carts, plows and sugar cane, worth in all \$17,000.

The right of action for fruits and revenues, and all damages, is reserved.

The defendant Browne filed a general denial, with an affirmation of all the executory proceedings and the averments; that said proceedings were instituted at the solicitation of plaintiffs, who never communicated to him or the sheriff the said military order of suspension; but having learned it accidentally he procured its revocation prior to the day of sale; that if any irregularities exist, they have been waived and cured by the acts and declarations of the plaintiffs, who were present at and ratified the sale; that J. B. Humphreys, one of the plaintiffs, through an agent, leased jointly with T. J. Burke, one of the defendants, the plantation in controversy from the purchaser, Browne; that to deprive the latter of the

testimony of said Bourke, sheriff, plaintiffs illegally made him a co-defendant, and that respondent is entitled to a severance and separate trial.

The sheriff made substantially the same defense. In a supplemental answer, Brown averred that the consideration of the contract inured to the benefit of plaintiffs, in extinguishing an equal amount of debts due by them, and on the trial he filed the plea of *res judicata* as to the demand for the nullity or rescission of the order of seizure and sale.

A separate trial was granted to each defendant, judgment rendered in their favor, and plaintiffs appealed.

By consenting to submit the case as to each defendant on the same evidence, plaintiffs have waived the necessity of passing upon the right of severance in the defense.

The plea of *res judicata* cannot be sustained, as no issue was joined in the executory proceedings, which can have the effect of the thing adjudged; the order is granted *ex parte* on authentic evidence, and the only question which the judge examines is whether the evidence is sufficient to authorize the *fiat*. C. P. 734. We do not think, however, there is any legal cause shown for annulling the order. There is no evidence that the notary derived his authority from a rebel governor, and it is shown that the funds, upon which the defendant Browne drew his check in favor of plaintiffs, were deposited in a bank in legal currency before suspension, and that plaintiffs used the said check in the extinguishment, to its amount, of their indebtedness to their factors and others.

But, in our opinion, the military order staying all proceedings against the property until the 21st January following, when notified to the sheriff, as it was about a week prior to the day fixed, effectually put an end to the sale on the day advertised, and necessitated a new advertisement according to law, before the sale could be properly made. It was an injunction issued by competent and paramount authority, and the subsequent order of revocation did not dispense with the legal formalities, and authorize the sale to be made on the day which had been fixed, but forbidden. Whether the cause was sufficient or insufficient, the order had the effect of staying all proceedings, and the subsequent order was not communicated to the sheriff until the night before the sale. In the forced alienations of property, all the formalities must be strictly observed.

The defense to this, that the plaintiffs have cured this and other defects, and ratified the sale, is not sustained by the evidence. It is shown that one of them, on the day of sale, requested one or two parties not to bid on the property, as the defendant Browne intended to buy it in for him. But this, at most, was an effort to secure himself and his creditor through the form of a public sale, and its effect, in this regard, depended on the execution of the whole agreement between himself and Browne, who cannot claim the benefit of it as a ratification, which he fails to show a compliance, or a readiness to comply on his part. The proof does not show that the same plaintiff afterwards joined in a lease of the property from the purchaser. The authority of the alleged agent to make such lease is not established by legal evidence. As a party cannot be controlled in the order of introducing his evidence, the written agreement signed by Burke, the real lessee, and D. F. Kenner, for said J. B. Humphreys,

J. B. &amp; W. K. Humphreys v. Browne et al.

was admissible, but could have no effect as proof, until the agency was shown by evidence of equal dignity, which was not adduced.

There is nothing to show acquiescence on the part of W. K. Humphreys. His presence at, and failure to object to the sale cannot be construed as a waiver of legal formalities, and his rights are unimpaired by the acts of his co-partner.

The property sold for \$11,000, and the assessor states that he assessed the plantation that year at \$25,000. Under all the circumstances, we think the judgment should be reversed, and the sale set aside. As to the articles claimed by plaintiffs as not seized and advertised, we find nothing, except probably cord-wood, which was not included and described in the act of mortgage, and which by distinction is considered immovable, and of course comprised in the sale.

The wood being represented to be at the sugar-house, is presumed to have been used in converting the crop into sugar for the market, and will be included in an account of the fruits and revenues.

It is therefore ordered that the judgments appealed from be reversed, and that the sheriff sale, on 4th November, 1865, of plaintiffs' property in the parish of St. John the Baptist, and known as the "Cornland Plantation," with the improvements and appurtenances, described in an act of mortgage passed before A. D. Doriocourt, notary public, in New Orleans, on 22d October, 1861, by plaintiffs, in favor of defendant S. Browne, be set aside and annulled, and said property be restored to plaintiffs. It is further ordered that plaintiffs' right of action, if any they have, against the defendants, for fruits and revenues, be reserved, and that defendants pay costs in both courts.

#### NO. 876.—BARRETT'S EXECUTORS v. PATRICK HALPIN.

The Second District Court of New Orleans is without jurisdiction in a suit where an estate is plaintiff. The Court is limited to probate jurisdiction alone. Acts 1865, p. 84, sec. 8.

**A**PPEAL from the Second District Court of New Orleans, *Thomas, J. P. H. O'Neal*, for plaintiffs and appellees. *A. McCarthy and Frank Haynes*, for defendant and appellant.

**LABAUVE, J.** The defendant is sued as endorser of a note, executed by *D. Donavon*, for \$450, dated 6th February, 1861, payable on the 1st of May of same year, bearing interest at eight per cent. per annum from maturity till paid.

The defendant first filed an exception, which was overruled, and he then filed a general denial.

We considered the exception waived in this Court, as our attention has not been called to it.

Judgment was rendered below in favor of plaintiffs, and the defendant appealed.

The defendant and appellant has suggested in this Court that the Second District Court, wherein this suit was instituted, had no jurisdiction in this case, the said Court being alone for probate affairs.



We are referred to the statutes of 1865, p. 84, § 8, where it is enacted : "That the Second District Court for the parish and city of New Orleans, shall be *strictly* a probate court, and shall have exclusive jurisdiction only of all successions and probate causes, and all appointments that may be necessary in the course of administration of estates, all matters relative to minors, to persons interdicted and to absentees, or in which they are interested, shall be made and carried on in said Court."

We are of opinion, in passing the act constituting the six District Courts of New Orleans, it was the intention of the lawgiver to restrict the jurisdiction of the said Second District Court to probate matters alone, and which are clearly enumerated, thereby excluding all other matters, *inclusio unus est exclusio alterius*; otherwise that Court would have been incumbered with so many other matters, that it would have become a Court of general jurisdiction, instead of being of *strict* probate jurisdiction.

Although the exception was not made below, it must prevail. The Court had no jurisdiction *ratione materie*.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled and avoided; and it is further ordered and decreed, that the suit be dismissed, at the costs of the plaintiffs and appellees in both Courts.

No. 1270.—Mrs. H. HUNLEY and Husband v. E. A. SCOTT.

Courts will not enforce a contract, the consideration of which is Confederate notes.

**A**PPEAL from the District Court, Parish of East Feliciana, Posey, J. W. F. Kernan and D. J. Wedge, for plaintiffs and appellants. McVea & Hunter, for defendant and appellee.

HYMAN, C. J. Defendant sold to Alexander Smith 60,000 pounds of ginned cotton, the price and consideration of which was Confederate notes, and the plaintiff, Mrs. Hunley, as the transferee of Smith, brought suit against defendant to enforce the delivery of the cotton. Her husband joined in the suit to assist her therein.

From a judgment rendered against her, she has appealed.

The bargaining in Confederate notes as the price of the cotton, thereby giving credit and confidence to paper obligations issued by citizens in rebellion against the Government of the United States, for the purpose of promoting the rebellion, was an unlawful cause of contract, and courts of justice cannot lend their aid in the enforcement of such a contract.

Plaintiff contends that, as she is the transferee of Smith, the unlawful cause in the contract cannot affect her.

Smith could not transfer to plaintiff greater rights than he himself had.

The judgment of the lower Court is affirmed.

No. 1288.—AMOS TOWNE *v.* MRS. F. A. BOSSIER, Testamentary Executrix.

The Supreme Court will not presume that the District Court received documents in evidence without the proper United States revenue stamps.

**A**PPEAL from the District Court, Parish of St. Tammany, *Ellis, J.* *Alfred Hennen*, for plaintiff and appellee. *Geo. W. Martin and Penn*, for defendant and appellant.

HYMAN, C. J. Plaintiff brought suit, in October, 1865, against the testamentary executrix of the succession of Joseph F. Auge Bossier, deceased, to recover judgment for half of the amount of three promissory notes, with interest.

The notes are for \$1,333 $\frac{1}{3}$  each—one became due on the 13th day of June, 1860; another, on the 13th day of September, 1860, and the third, on the 13th day of November, 1860.

They bear eight per cent. interest from the 10th day of June, 1858, the day of their date.

Before their maturity, the deceased (Bossier) acknowledged that they were made partly for his benefit, and bound himself to pay on them to the extent of the half of the amount for which they were given, with interest.

The defendant filed in the lower Court the plea of prescription of five years.

The District Judge rendered judgment against the succession for the half of the amount of the notes, with interest and costs.

From this judgment the executrix has appealed.

There is no evidence in the record showing that the prescription on the notes due in June and September, 1860, was interrupted or suspended, and the plea of prescription as to them must prevail.

The defendant contends that the notes were received in evidence without having stamps, in contravention of the revenue laws of the United States.

The defendant did not object to the admission of the notes in evidence, and there is nothing in legal form to indicate that the notes were introduced in evidence without stamps.

This Court cannot presume that the District Court authorized a fraud on the government. See 18 An. 573.

It is ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff, Amos Towne, do recover of the succession of Joseph F. Auge Bossier, the sum of six hundred and sixty dollars and sixty-six cents and two-thirds of a cent, with interest thereon at the rate of eight per centum per annum, from the 10th day of June, 1858, till paid, and the costs of suit in the District Court.

It is further decreed, that this sum, interest and costs, be paid by F. A. Bossier, the executrix of the succession of Joseph F. Auge Bossier, deceased, in due course of the administration of the succession.

It is further decreed, that plaintiff pay the costs of this appeal.

## No. 1256.—JOHN M. BACH v. M. VERBOIS et als.

The assertion of title by a third party to property about to be sold at judicial sale gives him a standing in court, by third opposition, to claim the proceeds of the sale in preference to others, and by that means to ratify the sale.

**A**PPEAL from the District Court, Parish of East Baton Rouge, *Avery, J. J. W. Burgess*, for plaintiff. *Dunn, Barrow & Pope*, for defendant. **LSLEY, J.** A judicial partition of a certain square of ground situate and lying in the city of Baton Rouge, designated on the plan thereof as the "Royal Square," having been entered in the above entitled suit, and a public sale thereof for that purpose effected, the city of Baton Rouge intervened as third opponents, claiming the whole proceeds of the sale as the sole owners of the property, in virtue of a title which they derived from the United States.

For the reasons hereinafter stated, the Court sustained a motion to dismiss the opposition, because no legal cause was shown in the opponent's petition. "The petition of the opponents," said the Judge, "in my judgment, shows no right whatever to the proceeds of the sale of the land heretofore ordered by this Court to be sold to effect a partition. The prayer of the said petition asks that the owners be declared the owners of the land, and asks also that the price for which it has been sold be paid to them. They also claim that by virtue of an act of Congress conferring upon them the ownership of the land in trust for the owners of it, and for those who have interests in and to it, they have a lien and privilege upon it, and, consequently, are entitled to the proceeds. Unless they were specially empowered by the act creating the trust to sell the same for the benefit of the *cestui que trust*, or be authorized by the Court upon a proper legal showing for that purpose to dispose of it, they could not sell it, and if they could not sell it, they could not ratify a sale of it, and therefore would have no right to claim the proceeds of the sale, in case such sale were made, whether legally or illegally by parties to whom it did not belong. I am of opinion, therefore, that they should resort to a petitory action against those in possession of the land, to assert their rights, if any they have, and that they cannot, in the form now attempted, have them adjudicated."

From a careful examination of the opponent's petition, we think the Court below erred in sustaining the motion, and dismissing the opposition. All the allegations in their petition must be considered as true, and after setting forth the grant by the United States to them of the premises, they aver that when the grant was made, there were no other owners thereof but the United States, whose title they held absolutely and unconditionally in fee simple. This would certainly give them a standing in Court under Article 396, part 1, et seq. C. P., to claim the price in preference to others, who had no title to the land, and by that means ratify the sale.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court dismissing the opposition be annulled, avoided and reversed, and it is further ordered, that the opposition be reinstated, and the case remanded to be proceeded in according to law, at the costs of the appellees.

No. 1325.—STATE OF LOUISIANA *v.* BENJAMIN BUTMAN.

In cases of conviction of the crime of libel, the law authorizes punishment by fine or imprisonment, or both, at the discretion of the Court. Acts of 1855, sec. 21.  
Where the Judge has limited his sentence to a fine, he cannot imprison more than twelve months in default of payment of the fine. Acts of 1855, sec. 4.

**A** PPEAL from the District Court, Parish of St. Tammany, *Ellis, J.*  
*A. S. Herron*, Attorney General, for the State. *G. H. Penn*, for defendant.

HYMAN, C. J. This case was on appeal to this Court in 1860, and was remanded to the District Court, with instructions to the District Judge to pronounce sentence on the accused according to law. See 15 An. Rep. p. 166.

In compliance with the instructions from this Court, the District Judge rendered judgment against defendant, sentencing him to pay a fine of five hundred dollars and the costs of prosecution, and decreeing that, in default of payment thereof, the defendant be imprisoned in the parish jail for twelve months.

The law authorized punishment for the crime of libel (of which crime defendant was convicted), fine or imprisonment, or both, at the discretion of the Court. (See act relative to crimes and offenses, section 21, approved March 14, 1855.)

This discretion is limited, so that the fine shall not exceed one thousand dollars, nor the imprisonment two years. (See 6th section of an act relative to criminal proceedings, approved March 14th, 1855.)

The law further declares that, when the Judge limits his sentence to a fine, he cannot decree that the person sentenced be imprisoned more than a year for default of payment of the fine. (See 4th section of same act.)

It appears that the District Judge has decreed against defendant under the provisions of the last named section.

He has not exceeded the limits of the law, either in the fine or term of imprisonment.

The defendant has appealed from the judgment of the District Judge for the purpose of delay.

Let the judgment of the District Judge be affirmed.

No. 1272.—JOHN REEVE *v.* MRS. M. E. DOUGHTY, and L. D. CHANCE.

The want, failure, or illegality of consideration may be established by parol testimony between the parties to the note.

Where the consideration of a promissory note is shown to be Confederate treasury notes, the Courts of this State will not enforce its payment.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J.*  
*W. F. Kernan*, for plaintiff and appellant. *Cross & Hardee*, and *Race, Foster & E. T. Merrick*, for defendants.

Reeve v. Mrs. Doughty et al.

HOWELL, J. This is a suit upon a promissory note for \$533 28, with ten per cent, interest, signed by the defendants, who allege that the whole contract is null and void, being based on a consideration (Confederate treasury notes) reprobated by the policy and laws of the United States.

The case was tried by a jury, and a verdict and judgment for \$63 09 were given in favor of plaintiff, who, after an uneffectual effort to obtain a new trial, has appealed.

Our attention is called to a bill of exceptions to the ruling of the Judge *a quo*, admitting parol testimony to prove the consideration to be Confederate treasury notes, to which plaintiff objected on the ground that defendants could not contradict their written acknowledgment and parol.

The want, failure, or *illegality* of consideration may be established by parol between the parties to the note. 12 M. 402, 475. 3 M. 643. 1 N. S. 90, 625. 8 N. S. 558. 1 L. 197. 10 L. 390. In a case like the present the paramount interest and policy of the public require, that such a defense should be allowed and established, and it is seldom, if ever, that other than parol evidence exists. 10 A. 199. 12 A. 219.

The evidence is direct that the consideration of the note sued on was Confederate treasury notes, and the whole contract is therefore null. 17 A. 263. The plaintiff is in possession of the evidence of an obligation which cannot be recognized in the Courts of this country. We agree with his counsel in the proposition that, defendants either owed him the amount of the note, or they owed him nothing; but the cause of the contract, the consideration of the notes being manifestly unlawful, against law, good morals and public order, exacted no obligation on the part of the defendants. There should have been a judgment rejecting plaintiff's demand.

It is therefore ordered that the judgment appealed from be reversed, and the verdict of the jury set aside, and it is now ordered that the demand of the plaintiff be rejected, with costs in both courts.

#### NO. 1286.—JAMES NASH v. A. L. EAST.

In a suit brought on a promissory note by a third holder against the maker, the payee and endorser is a competent witness for the maker to prove a subsequent agreement between the maker and payee, then the holder by which the note was to be extinguished.

**A** PPEAL from the District Court, Parish of East Feliciana, Posey, J. W. F. Kernan, for plaintiff and appellee. McVea & Hunter, for appellant and defendant.

HOWELL, J. This is an action on a promissory note by an endorser, after maturity, against the maker, the defense to which is a failure of consideration, and a subsequent agreement between the maker and payee, that the note should be extinguished by an account held by the maker against the mother of the payee.

The only question is presented by a bill of exceptions taken to the ruling of the District Judge, excluding, on the score of interest, the testimony of the payee offered by the defendant and appellant.



If he be viewed as an unconditional guarantor to his immediate endorsee, he is called on to testify against his own interest, as the release of the maker may make him solely liable. But if he stands in the same situation as the drawer or endorser of a bill, his endorsement creates a collateral liability only, which is dependent on a reasonable presentment and notice, which must be shown before the liability is fixed. Story on Notes, §§ 128, 133, 134; 12 M. 177.

In either view he is a competent witness for the maker.

Justice requires the case to be remanded to afford the parties an opportunity to have their rights adjusted, as the record does not enable us to do so.

It is therefore ordered that the judgment appealed from be reversed, and the case remanded, to be proceeded in according to law, with instructions to the District Judge to admit the testimony of L. W. Brown, the endorser.

Plaintiff to pay costs of appeal.

No. 1208.—MARIA E. MILLER and Husband *v.* V. J. DUPUY et als.

A suit is brought against the sureties on a tutor's bond, and defendants obtain an order of Court suspending all further proceedings in the cause, until the rights of plaintiffs and other parties contesting them, under certain seizures of the tutor's property, made since the institution of the suit, shall be determined: *Held*—That an irreparable injury may result from such interlocutory decree, and the plaintiffs are entitled to an appeal therefrom.

Where an exception has been tried and overruled by the District Judge, the same questions involved in the exception cannot be pleaded in the form of a motion to suspend further proceedings in the cause: this would be to renew and re-examine the exception which had been overruled. The decision on the exception may be reviewed with the merits on appeal.

**A**PPEAL from the District Court, Parish of Iberville, *Posey, J.*  
*Barrow & Pope*, for plaintiffs and appellants. *Talbot & Petit*, for defendants and appellees.

HOWELL, J. A motion is made to dismiss the appeal in this case, on the ground that the judgment appealed from is not a final one, nor is it such an interlocutory order or decree as will cause an irreparable injury to the appellant.

The suit is brought against the sureties on a tutor's bond, and, during the progress of the cause, the defendant, V. J. Dupuy, made a motion to suspend all further proceedings until the rights of plaintiffs, and other parties contesting them, under certain seizures of the tutor's property, made since the institution of this suit, to satisfy the claim of plaintiffs against said tutor, shall be determined, on the ground that said defendant is entitled to avail himself of the benefit of any sum recovered of his principal, the tutor, or any amount from which the said tutor might be released by the *taches*, informal and irregular proceedings on the part of plaintiffs in said seizures. The judgment granting this motion, and suspending indefinitely all further proceedings, is the one appealed from; and we think it one which may cause irreparable injury to the appellant. It is something more than an ordinary continuance. By it plaintiffs are

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prohibited from prosecuting their rights, until other proceedings in other cases are concluded, thus procrastinating the suit to an indefinite period, which might result in a virtual denial of justice. The contests arising out of the seizures in question, the determination of which the proceedings in this case are ordered to await, may be protracted in the lower and appellate Courts, and, in the mean time, the condition of defendant changed, and the rights of plaintiffs seriously impaired.

The motion to dismiss must be overruled.

The question presented on this appeal is properly one of practice.

The defendant, Dupuy, filed an exception that plaintiffs had no right of action against him as security on the tutor's bond, until the necessary steps shall have been taken to enforce payment against the principal. This exception was overruled, whereupon he filed an answer, and afterwards an amended answer, renewing the grounds of his exception as a defense to the suit, setting forth certain acts of plaintiffs as operating his release from liability, and other proceedings on their part, which entitle him to have this suit suspended until they are disposed of.

At a subsequent term of the Court, he makes virtually the same matters the basis of a motion to suspend further proceedings. This is a practice unknown to our law or jurisprudence. If plaintiffs had a right of action against the surety, as the Court had decided, they were entitled to prosecute that action to a judgment, without reference to their proceedings against the principal. The correctness of the ruling on the exception can be reviewed on appeal from the final judgment on the merits.

Plaintiffs either had a right of action against the surety on the tutor's bond, or they had not. Their right of action having been recognized by the Court, the order suspending proceedings, for the cause alleged, was irregular; it was virtually renewing and maintaining the exception which had been overruled. The fact that plaintiffs, pending their action against the surety, discovered and levied upon property of the principal, does not, in our opinion, lessen their right to prosecute an action already accorded to them, whatever may be the effect thereof, under an execution on any judgment they might obtain.

It is therefore ordered, that the judgment appealed from be reversed, and the case remanded to be proceeded in according to law; defendant and appellee to pay costs of appeal.

LABAUVE, J., recused.

No. 1213.—NELSON POTTS v. MRS. E. BLANCHARD, Wife of F. COONEY,  
et als.

A part of the heirs of an estate sold to the other heirs their interest in the property of the succession, consisting of land, slaves and movables. The vendees specially mortgaged "said land, slaves and movables," to secure notes given in part payment, and in said mortgage described the whole property of the succession: *Held*—That the mortgage attached to the whole property, and not alone to the interests conveyed by the vendors.

**A**PPEAL from the District Court, Parish of West Baton Rouge, *Posey, J.*  
*Barrow & Pope*, for plaintiff and appellant. *Farrot & Lamon*, for defendant and appellee.

HOWELL, J. On the 16th February, 1859, four of the heirs of Widow Blanchard sold to the remaining eight heirs, "all their right, title, claim and interest in and to the succession of their late mother, deceased, and consisting in lands, slaves and movable effects as set forth and described" in the act of sale, taking in part payment twelve notes to secure the payment, of which "at maturity said land, slaves and movable effects shall remain specially mortgaged and hypothecated in favor of the vendors, or any holders of said notes." The vendees formed an ordinary partnership under the style of V. Blanchard & Co., which firm, on 23d February, 1859, borrowed \$20,000 from Nelson Potts, plaintiff, and mortgaged all the property which belonged to the succession, and the same as described in the first named act, to secure the payment of the note given for the loan.

Plaintiff brought this suit against all of the said heirs to have his mortgage decreed to have priority over that in favor of the said vendors, so far as the two-thirds of the property originally owned by said vendees were concerned. He subsequently filed a supplemental petition, asking for judgment against the members of the firm of V. Blanchard & Co., jointly.

Three of the said vendors deny the preference claimed by plaintiff, and aver that as holders of the notes taken by them they are entitled to priority of rank over plaintiffs as mortgage creditors. The fourth one excepted to the action, alleging that she has no interest, having parted with her portion of the notes.

Judgment was rendered sustaining this exception, and rejecting plaintiff's demand of priority of rank, from which he appealed as to the three heirs only, who answered.

The question presented is one of construction of the act of mortgage, given by the purchasing heirs to their vendors, the appellees—whether or not the whole property described in the act of sale and mortgage was mortgaged, or only the proportion or interest sold.

We think there can be no doubt that the mortgage was intended to be, and was actually given upon the whole property, susceptible of mortgage, belonging to and constituting the succession inherited by the contracting parties, and which was described fully in said act. The vendors sold only their interest in said succession, the property in which that interest or right existed, and with reference to which the parties contracted, was the entire property of the succession, consisting of lands, slaves and movables, to all of which the vendees and mortgagors acquired a title by the act of sale, and the clause establishing a mortgage in favor of the vendors or other holders, stipulates that "said land, slaves and movable effects shall remain specially mortgaged and hypothecated," to secure the payment of the notes given. It does not say the proportion sold, but the property described, and the description is of the whole property.

The use of the word "remain," makes it no less a contract of mortgage affecting the property intended to be incumbered.

If any doubt existed, as to the interpretation of the mortgage clause, it should, we think, under Article 1952, C. C., be interpreted against the mortgagors, who are the obligors in the contract of mortgage, and whose duty it was to expressly enumerate the property mortgaged, and to state

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precisely the nature and situation thereof. See C. C., Arts. 3273, 3274 and 3275. The act in this case does, however, state precisely the nature, situation and quantity of the property on which the mortgage is granted, to wit: the property belonging to the succession of Widow Blanchard fully set forth and described in the act of sale, the interest in and to which of four of the heirs was sold to the remaining eight heirs, the latter acquiring title to and mortgaging all of said property in the same act.

The authorities cited by plaintiff do not sustain his position.

We cannot inquire into his demand for judgment on his supplemental petition against the makers of the note held by him, as there is no appeal as to them.

Judgment affirmed, with costs.

No. 1292.—JONATHAN MONTGOMERY et al. v. MRS. ELEANOR E. BARROW and Husband, and Others.

Issues of fact, not raised in the District Court, will not be passed upon in the Supreme Court. Where real property was advertised by the sheriff, and on the day fixed he postpones the sale, without offering the property, he must advertise the same anew for thirty days, or the sale will be declared null.

Discretion in the execution of legal solemnities cannot be supported.

**A**PPEAL from the District Court, Parish of West Feliciana, *Cooley, J.* *F. H. Farrar and R. Montgomery*, for plaintiffs and appellees. *S. J. Powell, Collins & Leake*, and *Race, Foster & E. T. Merrick*, for defendants and appellants.

**HOWELL, J.** This suit is brought to annul the sale of a tract of land belonging to the insolvent succession of Wm. R. Barrow, deceased, made by the sheriff at the instance of the creditors.

A motion is made to dismiss the appeal, on the ground that all the creditors of the succession are not made parties to the appeal.

If any others than plaintiffs have an interest in maintaining the judgment of the lower Court, that interest is covered by the insertion in the appeal bond of the words, "and others," as obligors—the appeal having been granted on motion in open Court.

The motion to dismiss must be overruled.

An exception was taken to the capacity of the Bank of Louisiana to stand in judgment, but not being urged in this Court, it is considered waived.

Of the many grounds, taken by plaintiffs in their petition, for setting aside the sale, two are urged in this Court, to wit :

1. That the legal notices to creditors, required by law in insolvent proceedings, were not given.
2. That the property was not advertised for the length of time required by law for the sale of immovables.

Another ground, that the sheriff did not sell personal and real property for cash, to the amount of \$20,500, before selling any of the land on a credit, as directed in order of sale, is raised before us ; but not having been

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pleaded or passed on in the lower Court, such an issue cannot be made here, this Court not being vested with original jurisdiction. 6 R. 265. 7 R. 138. 19 A. 43.

We consider it necessary to examine the second point only, deeming it fatal to the validity of the sale.

The whole property of the succession was advertised on the 9th December, 1865, to be sold by the sheriff, at the late residence of the deceased, on the 10th January, 1866, on which day he sold the personal property, amounting to only \$561, and, *without offering the immovable property*, postponed the sale thereof to the 3d day of February, at the court-house, continuing the same advertisement, with a notice at the foot of it, in the paper of the following week, of the postponement; on which day, being twenty-four days after the first day, and about twenty days after the second advertisement, the land in controversy was sold, and bought by the defendant, Mrs. Eleanor E. Barrow, one of the heirs.

It does not appear that the sheriff was unable, for want of time, to complete the sale on the first day, but, in his return, he states that the sale was postponed because there were no bidders for real property present. He does not inform us how he ascertained this fact, while his return shows that Mrs. Barrow, who bought at the second sale, must have been present, as she purchased most of the personal effects.

Admitting the necessity and propriety of a postponement, we think the law applicable to such cases required the second advertisement to be for thirty days, which is the only advertisement prescribed for the sale of immovable property belonging to successions (see C. C. 1159), except as provided by Article 990 C. P., which directs that property, which does not bring the appraised value *at its first offering*, shall be sold within a given time *on a credit of twelve months*, and cannot be held to apply to the present case, in which the property was not offered at the first sale, but was sold on the terms fixed by the creditors, and should have been advertised *de novo* for thirty days. Unless some special law is shown, providing a different rule for such a case, the general law must be followed, and that law requires thirty days' advertisement of real estate.

"The doctrine of discretion, in the execution of legal solemnities, cannot be supported on any ground—even that of necessity. The abuses to which it would open a door are too obvious to require any comment."

Judgment was rendered in the lower Court in favor of plaintiffs, which we think correct.

Judgment affirmed, with costs.

No. 1179½.—ALMA J. MENSON, Wife of G. A. GRAVES, *v.* FRANCIS E. ROBERTSON, Administrator.

An endorsement of payment on the back of a note, without evidence showing when and by whom such endorsement was made, will not interrupt prescription.

Where a note is prescribed on its face, and it is not proved that plaintiff could not have brought his action at an earlier date, the plea of prescription will prevail.

The mere existence of the late war did not of itself suspend prescription.

**A** PPEAL from the District Court, Parish of Terrebonne, *Gates, J.*  
Clifford Belcher, for plaintiff and appellee, *F. S. & J. S. Goode,*  
for defendant and appellant.



Mrs. Munson v. Robertson.

LABAUVE, J. This suit is brought against the estate of Royal March, on a mortgage note dated 5th January, 1858, payable twelve months after its date, for \$5,000, with a credit endorsed on the note, 26th June, 1860, for \$440 50.

The defendant, among other defenses, specially pleaded the prescription of five years.

The District Court, after hearing the evidence, gave judgment for plaintiff, and the defendant took this appeal.

The citation and petition were served twice on the defendant. On the 10th June and 19th July, 1865.

It is contended that the payment credited on the note 26th June, 1860, acknowledged the debt and interrupted prescription, but there is no evidence showing by whom and when this endorsement was made, and it is well settled that, without such proof, the credit would not interrupt prescription. 11 R. 449. 4 A. 419. 7 A. 548. 10 A. 275. 12 A. 661. Therefore, the prescription commenced running from the 8th of January, 1859, and the note was *prima facie* prescribed on the 9th of January, 1864; in that case, it was incumbent on the plaintiff to prove facts or circumstances, showing that prescription had been interrupted or suspended.

There is nothing in the record going to show that plaintiff could not have brought her suit sooner; the mere existence of the war did not suspend prescription as a general rule. Upon questions of prescription, the circumstances and facts of each case, and the respective situation and residence of the parties must be taken into consideration as to the impossibility of bringing suit.

As the case stands, by the evidence in the record, were we to pass upon the question of prescription, we are satisfied that the note would be considered prescribed. We think that justice requires the remanding of the case, in order to give the plaintiff a chance to show by further evidence that prescription was interrupted or suspended. Both parties have suggested in their briefs, the remanding of the case in order to have an opportunity to introduce further evidence on both sides.

It is therefore ordered and decreed, that the judgment appealed from be annulled and avoided, and that the case be remanded for further proceedings according to law; the plaintiff and appellee to pay costs of appeal.

No. 1321.—ELI DANGERFIELD, f. m. c., v. WM. N. FAUVER.

Where a person has been decreed to be the owner of a mule, in the possession of another, he is entitled to recover it, and hire for its services while in the possession of defendant, but he cannot recover its value in money, in default of delivery, without proof of what the property is worth.

**A** PPEAL from the District Court, Parish of East Feliciana, Posey, J.  
D. J. Wedge, for plaintiff and appellee. MeVea & Hunter, for defendant and appellant.

*Dangerfield v. Fauver.*

HYMAN, C. J. The plaintiff, who styles himself in his petition a f. m. e., brought suit to recover of defendant a mule.

He prayed in the alternative, either that he recover it or its value.

He also asked judgment against defendant for the value of its services from the time defendant was in possession of the same, to wit: January, 1865, to 25th July, 1866, the time when suit was instituted.

Plaintiff sequestered it, and defendant released it from sequestration, by giving bond and security for its delivery to plaintiff; in the event judgment should be rendered against him, defendant.

The District Judge rendered judgment, decreeing that plaintiff was owner of the mule, and condemning defendant to deliver it to plaintiff, and also decreeing that, on his failing to deliver it, plaintiff recover of him \$250, its value.

The judge further decreed in the judgment that plaintiff recover of defendant fifty dollars for its services.

The defendant appeals from the judgment.

The evidence satisfies us, as it did the District Judge, that plaintiff is owner of the mule.

It was his peculium, that his master permitted him, while a slave, to own, and was his property when he became free.

Defendant took possession of it, when it had strayed from its owner, and used it from January, 1865.

The judgment of the District Judge is erroneous in decreeing defendant to pay \$250 to plaintiff, on his failing to deliver it. There is no proof adduced of its value.

The judgment for its services is excessive. The proof is that its services were not worth more than \$37 50, from the time defendant took possession of and used it, up to the institution of suit.

It is decreed that the judgment of the District Court be annulled, avoided and reversed, and it is further decreed that defendant deliver the mule to plaintiff, the owner thereof. It is further decreed, that plaintiff recover of defendant the sum of thirty-seven dollars and fifty cents for the value of its services, to 25th July, 1866, and the costs of suit in the District Court.

The plaintiff to pay the costs of appeal.

#### NO. 853.—RAILEY & CAMPBELL c. WM. BAGLEY et als.

An attorney has no authority to release his client's debtor, except on payment in the legal currency of the United States.

**A** PPEAL from the District Court, Parish of St. Tammany, *Jones, J. D. N. Hennen*, for plaintiffs and appellants. *G. W. Martin*, for defendant and appellees.

ILSLEY, J. This is a suit to annul a receipt and satisfaction of judgment, and to reinstate as it stood originally on the records of the recorder, the mortgage held by the plaintiffs to secure their claim against

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the defendants William Bagley, and to be authorized to prosecute their suit *via executiva*, No. 816, entitled *Railey & Campbell v. William Bagley et al.*

The ground for the annulment, etc., is that the plaintiffs' counsel and attorney was never authorized by them to receive in payment and satisfaction of their mortgage claim anything but the legal currency of the United States, or its equivalent, and they say that they are in no wise bound or affected by the act of their said attorney, in receiving without their knowledge or consent, as satisfaction of their said claim, bonds or treasury notes of the so-called Confederate States.

The defendant Bagley maintains the validity of the payment, made by him to the plaintiffs' attorney, and says that the said payment was made to the said attorney upon a forced demand without combination or collusion.

The parish recorder, who is made a party to the suit, answers that the special mortgage of the plaintiffs was by him, the recorder of mortgages, canceled and erased by virtue of and pursuant to the express order, command and authorization of the District Court of the parish of St. Tammany.

The facts of the case, regarding the payment made to the attorney, are stated by himself in his examination on the trial. He says that he does not know the plaintiffs personally. He received from the firm of Railey & Campbell for collection the note in the suit No. 816, and the receipt of the witness on file shows the settlement made on the 22d April, 1863; payment was made in Confederate money—treasury notes, which are on their face an obligation to pay a certain sum at a stated term. On his cross-examination, he says: "At the time the suit No. 816 was brought, Confederate notes were the only currency. The military authorities threatened parties with punishment who refused to take Confederate money. He considered he had full power to collect and settle the debt; he had several letters from the plaintiffs, but cannot find them now. He says that Bagley, at that time, was receiving Confederate notes for all debts due him. On the 22d April, 1863, Confederate notes were received at par for notes and debts; they were received as gold and silver by the officers of the Courts."

Dr. Carradine, another witness, says that at that time, in April, 1863, there was a great difference between specie and Confederate money, and between the latter and the notes of the New Orleans banks.

The principle is settled beyond controversy, that an attorney has no authority to release his client's debtor without payment; and that any agreement to receive payment in anything but the legal currency of the United States will not, without the consent of his client, be binding upon the latter. See 3 Rob. 278; 2 An. 328; 9 A. 488, and authorities therein cited.

The attorney's receipt, in the present case, is given in full satisfaction of the plaintiffs' claim, without specifying in what manner payment was made to him.

This would have concluded the plaintiffs, had they not shown that the payment was not made in the legal currency of the United States, or any

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thing legally equivalent to it, but in an issue deemed illegal, to wit: *Confederate treasury notes*, without their knowledge and consent.

We are not called upon to say now what would have been the effect of a payment in that issue, had it been made to the plaintiffs themselves, but we are all satisfied that it was entirely beyond the legal scope of the authority of an attorney-at-law to receive for his client anything but lawful money or its equivalent, which is ordinarily taken as the representative of lawful money. *Noland v. Rogers*, 4 N. S. 146.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that judgment be and it is hereby rendered in favor of the plaintiffs and against the defendants.

It is further ordered, that the payment, acquittance and satisfaction of judgment acknowledged and recognized by the plaintiffs' attorney, in the suit No. 816, in his receipt dated 22d April, 1863, be and the same are hereby declared illegal, void, and of no effect, and that the property described in the act of mortgage, referred to in the proceedings in said suit No. 816, of date 26th March, 1860, to secure the note of two thousand dollars therein sued on, is still subject to the said mortgage therein recited; and that the cancellation or erasure by the recorder of mortgages in and for the parish of St. Tammany, of the said mortgage, on or about the 20th August, 1863, is illegal and of no effect, and the said recorder is hereby ordered to annul the said erasure, and to restore the said mortgage to its proper legal inscription.

It is further ordered, that the plaintiffs be authorized to prosecute according to law their suit *via executiva*, No. 816, entitled *Railey & Campbell v. William Bagley*, and to use such other legal remedies for the recovery of their said claim as they may deem necessary. It is further ordered, that the defendant pay the costs in both courts.

No. 1102.—WIDOW ALPHONSE PERRET *v.* PIERRE ROUSSEL.—Third Opposition of EDWARD ROUSSEL.

The prescription of four years, established by Article 356 of the Civil Code, does not apply where the minor, after he has obtained his majority, has made a settlement with his tutor, and taken the promissory notes of the tutor in liquidation of his indebtedness.

The legal mortgage in favor of minors upon the property of their tutors, created by Article 322 of the Civil Code, is assignable, but it cannot be extended so as to cover the expansion of the debt by the addition of the interest stipulated in consideration of an extension of time.

**A**PPEAL from District Court, Parish of St. John the Baptist, *Beauvais, J. A. Provosty*, for plaintiff and appellant. *Johnson, Denis, Berault & Legendre*, and *J. Bossier*, for defendant and appellee.

TALIAFERRO, J. Pierre Roussel, father and tutor to Emile Roussel and Edward Roussel, made a settlement with his eldest son Emile, on the day he attained the age of majority, viz : 11th May, 1859. The indebtedness of the tutor was fixed at \$12,337 80. The settlement was made by notarial act, which was duly recorded on the 21st of May of the same year.

On the day of settlement, the sum of \$337 80 was paid, leaving \$12,000 due. To this balance was added \$2,880, the interest (at eight per cent.) on the principal, divided into annual installments—the whole amount being \$14,880. For the payment of this sum, the father executed seven promissory notes: one for \$960, payable one year after date; two for the sum of \$2,160 each, payable two years after date; two for the sum of \$2,320 each, payable three years after date; and two for the sum of \$2,480 each, payable four years after date. These notes were drawn by Pierre Roussel, payable to his own order and endorsed by him. They stipulated the payment of eight per cent. per annum interest, from maturity, if not punctually paid, and are paraphed *ne varietur* by the notary before whom the settlement was made. The object of the notary's paraph seems to have been to identify the notes with the minor's tacit mortgage, as it is expressed in the authentic act, that it "was reserved to his pupillary claim, the nature of which, the parties agreed, could never be considered as changed, and which, on the contrary, they intended to maintain in all its *force and integrity*."

One of the notes for \$2,160 was transferred by Emile Roussel to Mrs. Perret, the plaintiff in this case, who obtained judgment upon it according to its tenor, on the 22d of September, 1865, with recognition of the legal mortgage to secure its payment.

On the 5th of May, 1866, there was a judgment recorded against Pierre Roussel, in favor of Joseph Bonneville, founded (as it seems) upon one or more of the notes of the series, furnished by Pierre Roussel to Emile Roussel, as before stated. Upon these judgments executions were issued and seizures made, on the 15th of May, 1866, of the same property—a tract of land with improvements, situated in the parish of St. John the Baptist.

On the 12th of July, 1862, Edward Roussel, the brother and co-heir of Emile Roussel, became of age. He instituted a suit against his father as tutor, and obtained a judgment against him on the 21st of April, 1866, for the same amount that was fixed as the tutor's liability to Emile Roussel, the oldest son. The legal tacit mortgage was recognized in favor of Edward Roussel, as being concurrent with that of Emile's, referred to in the notarial act before mentioned. An execution was issued on this judgment of the youngest heir, and seizure of the same property was made on the same day that the seizures of Mrs. Perret and Emile Roussel were made.

Pending these proceedings, Edward Roussel, by third opposition, filed a petition, in which he alleged that, by virtue of his legal mortgage upon his father's property, he is entitled to be paid by preference the entire amount of his judgment, interest and costs; that Mrs. Perret and Bonneville have no mortgage of any kind on the property, subject to his general mortgage; that the mortgage right they claim is prescribed, if it ever existed; and he prayed that they be cited, and that a decree be rendered in his favor, as prayed for.

Mrs. Perret answered by a general denial. She sets up the legal mortgage accorded to her by the judgment rendered in her favor, in the suit entitled *Widow Alphonse Perret v. Pierre Roussel*, and also a judicial mortgage resulting from the recording of that judgment. She denied the op-



ponent's right to be paid in preference to, or concurrently with, her claim, out of the proceeds of the property seized.

Bonneville does not appear to have been a party to this suit.

On the trial of the opposition, the Court below rendered judgment maintaining, in favor of Mrs. Widow Alphonse Perret, the legal mortgage accorded to her by the previous judgment, for the entire principal of her claim and for the whole amount of the interest thereon, calculated at five per cent. instead of eight per cent., as expressed in that judgment, and decreeing that the claims of both parties be paid concurrently out of the proceeds of the property seized, their legal mortgages being of equal rank.

From this judgment Edward Roussel, the opponent has appealed.

The questions presented for solution in this case, are :

1. Is the claim of Emile Roussel against his tutor prescribed ?
2. Is the legal mortgage of minors, upon the property of their tutors, assignable ?

The Article 356 of the Civil Code declares that "the action of the minor against his tutor, respecting the acts of the tutorship, is prescribed by four years, to begin from the day of his majority."

The Article 3282 gives to "minors, persons interdicted and absentees, a legal mortgage on the property of their tutors and curators, as a security for their administration, from the day of their appointment until the liquidation and settlement of their final account."

The action in the present case is not for the rendition of an account, nor for acts or omissions of the tutor during the tutorship, by which the minor suffered injury of any kind, but it is instituted by Mrs. Perret, as transferee of Emile Roussel, to recover a part of the sum due him, as ascertained by an account of the tutorship, rendered by the tutor and accepted and approved by the minor, after he attained his majority. We do not think, therefore, that the prescription of four years established by the Article 356 is applicable. 4 La. 368. 6 La. 161. 11 R. 491. 10 R. 173.

The effect of the liquidation of the minor's claim was to take it out of the provisions of Article 356, and to place it under those of Article 3508 of the Civil Code, limiting personal actions generally to the period of ten years. But the debt due was to be paid in installments, for which negotiable promissory notes were given. This would seem to indicate the prescription of five years as the one applicable to the case, inasmuch as promissory notes are prescribed in five years, reckoning from the time they become due. Whatever may be the nature of an obligation, evidenced by a negotiable instrument, it is subject to the same prescription as the instrument itself. This is well settled in the case of *Coman v. Pulley*, 11 An. 1. The note sued on by Mrs. Perret is dated 21st of May, 1859, and became due two years after date, that is, on the 21st of May, 1861. The 21st of May, 1866, was the period at which it would have been prescribed, had nothing occurred to prevent the prescription. Suit was instituted, however, on the 4th of September, 1865, and the citation served the next day. The obligation was not therefore prescribed.

In the next place, it is contended that legal mortgages are *stricti juris*, and should be rigidly limited to the purposes for which they are estab-

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lished by law. It is ! in this case, that the pupillary mortgage cannot be extended, to e as security for the payment of the notes; that it is strictly personal to the minor, and can only be exercised by him to enforce the payment of his claims against his tutor, and that the giving of the notes did not extinguish the pupillary claim, *on which alone*, the legal mortgage is founded; that there was no novation, and that the pre-existing obligation was not extinguished.

The indebtedness of the tutor to the minor, ascertained and fixed by final account rendered by the tutor, when the minor attains his majority, constitutes a claim or right which he may sell and transfer. The law accords him a legal mortgage on the property of his tutor to secure the payment of that debt. The right of mortgage would be shorn of much of its value, if, when he finds it to his advantage to transfer his pupillary claim, he could not also transfer the right which secures its payment. If this right were denied him, the debt against his tutor might be rendered unavailable, at a time when he most needed the benefit of it.

It is the settled rule of this Court to construe legal mortgages strictly; but, while this rule is kept in view, we must give them all their proper efficacy. We find no law that prohibits the transfer of the legal mortgage given to minors upon the property of their tutors. If public policy required that such transfer should be prohibited, it would be within the province of the legislator so to direct. We do not anywhere find that he has done so. On the contrary, Article 2424 of the Civil Code, declares that "not only corporeal objects, such as movables and immovables, live stock and produce, may be sold, but also incorporeal things, such as a debt, an inheritance, a servitude, or any other rights."

Article 2615 declares that "the sale or transfer of a debt includes everything which is an accessory to the same, as suretyship, privileges and mortgages."

In the case now under consideration, the usual objection, that the tacit mortgage acts secretly, has no place. In the attitude in which it is placed by the parties, it puts aside its feature of concealment. By an authentic act, on the public records of the parish where the real estate is situated, which is affected by the mortgage, the intention of the parties is expressed that the right shall continue, and the notes are paraphed by the recorder and notary to identify them with the act.

But, in accordance with the rule just announced, the mortgage must be restricted to its proper limits. It can not be extended to cover the expansion of the debt by the addition of the interest stipulated for the extension of the time of payment. The tutor owed Emile Roussel, the elder brother, \$12,000, with legal interest from the 21st of May, 1859, the date of the settlement. Edward Roussel, the younger brother, had judgment in his favor against the tutor for \$12,337 80, with judicial interest from the 12th of July, 1862. The rights of the two heirs spring from the same source. The same legal mortgage secures these rights, and this equality of rights must be observed in the distribution of the proceeds of the sale of the mortgaged property. The judgment of the District Court was erroneous in allowing Mrs. Perret the full amount of the note she brought suit upon. It should be reduced in the ratio that \$14,880 bears to \$12,000, that is, to \$1,741 93.

It is therefore ordered, adjudged and decreed, that the judgment of the lower Court be amended, so as to enforce the mortgage claim of Mrs. Perret to the extent only of \$1,741 93, with five per cent. interest from the 21st of May, 1859; and that, in all other respects, the judgment be affirmed.

It is further ordered, that the defendant and appellee pay costs in both courts.

No. 441.—L. H. PATTERSON v. CAPT. J. HASLEP, PART OWNER, AND OWNERS of Steamer Andy Fulton.

Plaintiff shipped at New Orleans, December 18th, 1860, as pilot on the Fulton, bound on a voyage to Bayou Maçon; at Dunn's landing he voluntarily left the boat, in consequence of being told by the captain that wages would be stopped while the boat remained at that point: He has no action in damages nor for services beyond the time actually employed, he not having put defendant in default.

**A** PPEAL from the Fifth District Court of New Orleans, *Ogden, J.* Singleton & Clark, for plaintiff and appellee. R. & H. Marr, for defendants and appellants.

LSLEY, J. It appears from the record that on the 18th December, 1860, the plaintiff shipped at New Orleans, as pilot on board the Andy Fulton, bound on a voyage to Bayou Maçon. The boat had proceeded up the bayou as far as Dunn's landing, when, on the 23d of the same month, the plaintiff left her, in consequence of a remark made by the captain, to this effect: "I suppose you know wages are stopped while we lay here, waiting to see whether we will go up or down. If the bayou rises, we will go up; if not, we will go back, and will board you on the boat a few days."

The plaintiff alleges that he is entitled at least to one month's wages, and that (having received sixty dollars) there is still due to him two hundred and forty dollars; and he further says, that at the place at which he was discharged, it was impossible to obtain any conveyance to return to New Orleans, and he was compelled to travel twenty-five miles, ten on a raft and fifteen on foot, to reach the Mississippi river. That his sufferings were very great, and he arrived at Waterproof completely exhausted, in consequence of all which he claims seven hundred and forty dollars damages.

The defendants pleaded a general denial, and set up a special defense.

The case was submitted to a jury, who found a verdict for the plaintiff for two hundred and forty dollars, with legal interest and costs, and from a judgment thereupon rendered the defendants have appealed.

The plaintiff's wages were rated on the books of the boat at three hundred dollars per month, but the testimony leaves it doubtful whether the hiring at that rate was by the month or by the voyage, or for the time only that the services were rendered.

The plaintiff, however, put his own construction upon it; for, considering himself discharged by the captain, he applied for and received from the

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officers of the boat payment for his services for the exact amount computed by the time he had rendered services upon the boat, and this without objection or complaint.

Employed subsequently in the same manner, and in the same capacity upon the same boat at the same rated wages, (C. C. 1951) he received for nine days' services, ninety dollars. If the remark made by the captain was really a discharge or intended as a modification of any other or different contract, it was acquiesced in by the plaintiff.

In any contingency, no action lay, because no steps were taken by the plaintiff to put the defendants in default. 1907 C. C. But this was not resorted to, because the plaintiff was satisfied that there was no unexecuted existing contract, and the bringing of the present suit was, as we think, an afterthought.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and it is further ordered that the judgment be and it is hereby rendered in favor of the defendants and against the plaintiff, with costs in both courts.

No. 1289.—THEODORE O. STARK *c.* MRS. F. A. BOSSIER, Testamentary Executrix.

An entry made by the clerk of the District Court in the margin of the record of appeal, opposite the copy of note sued on, stated that: "No stamps as required by law, annexed or attached to this note," is not evidence that the note was received by the lower Court without the proper revenue stamps.

**A** PPEAL from the District Court, Parish of St. Tammany, *Ellis, J.*  
*Alfred Hennen*, for plaintiff and appellee. *Geo. H. Penn*, for defendant and appellant.

**LABAUVE, J.** This suit is brought on four promissory notes of \$1,500 each, dated 10th June, 1858, and payable, respectively, in nine, twelve, fifteen and eighteen months after date thereof.

This suit was filed on the 5th, and served with citation on the 17th October, 1865.

The defendant first filed the plea of prescription of five years as a peremptory exception, reserving the right to answer over. This exception being overruled, the defendant pleaded a general denial, and the want of consideration of said notes sued upon, the same being obtained under fraudulent representations, and used entirely for the use of said Stark, who pretended to be owner or part owner of a resurrected concern, called the Louisiana Courier, now a defunct newspaper, whose whole value, including press, type and material, did not amount to one-hundredth part of the sum of said notes.

The Court below, after hearing the evidence, gave judgment for plaintiff.

The defendant took a devolutive appeal.

The defendant and appellant has abandoned in this Court all the

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defenses made below, such as prescription and failure of consideration, to none of which he has called our attention, and they are considered waived, but he insists that the notes sued upon were introduced in evidence without stamps, and that the suit should have been dismissed; the only defense made in this Court, is as follows:

"This petition and notes annexed were filed 5th of October, 1865; none of these notes have ever been stamped, as the revenue law of the United States requires.

If offered and filed on trial below, it has been done in violation of a prohibitory law, and in fraud of the revenue law of the United States, approved 3d March, page 481.

The defendant and appellant could not consent to the filing of these notes as evidence without stamps, because the law forbids it.

There is no evidence in the record of plaintiff's demand.

Appellant, therefore, asks reversal of the judgment of the lower Court, and that there be judgment in his favor, with costs in both Courts."

The notes sued upon, being duly proved as to signatures, were offered and received in evidence below, without objection.

But we find in the margin of the transcript, opposite each and every note, the following entry under the seal of the Court:

"No stamp, as required by law, annexed or attached to this note.

21st February, 1867.

PAUL GUSMAN, Deputy Clerk."

Exclusive of that entry, there is nothing in the record showing that the said notes were not stamped. In *Roberts v. Murray*, 18 An. 572, this Court said :

"The defendant contends that the judgment should be reversed, because the contract of sale was received in evidence without having a stamp as required by the revenue law of the United States Government.

The defendant did not object to the admission of the contract of sale in evidence, and there is nothing in the record to show or indicate that it was admitted without a stamp; and this Court cannot presume that the District Court authorized a wrong to be perpetrated on the Government, by permitting an unstamped obligation to be used as evidence."

Now the question arises: Is the above entry legal evidence before this Court, of the fact that there was no stamp as required by law, on the notes sued upon?

The clerk is a ministerial officer, whose duty and power are well defined by law.

After the appeal has been allowed and the surety given, the clerk of the Court from whose judgment the appeal is taken, shall make a transcript of all the proceedings, as well as of all documents filed in the suit, and annex to the same the petition of appeal, in order that the same may be delivered to the appellant when demanded. C. P. Art. 585.

The clerk then is to copy all the proceedings, and all the documents as he finds them in the suit, without adding to or subtracting from them one single word. His duty was to copy the notes as they were filed, without making any remarks creating negative or affirmative evidence for either of the parties. Had even the Judge below, stated in his judgment that the notes were not stamped as required by law, and dismissed the



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suit on that ground, it would be no evidence before us of that fact, as is well settled in our jurisprudence.

We can, therefore, take no notice of that entry, and the record remains without anything showing that the notes were not stamped as required by law. In other respects plaintiff has clearly made out his case.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be affirmed, with costs.

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No. 1188.—WIDOW CYPRIAN RICARD *v.* WM. G. HARRISON.

An obligor on a special mortgage, given as additional security to a note already secured by a mortgage given by another party and on other property, cannot be treated as a third possessor. Such an obligor cannot avail himself of the plea of discussion.

Notes endorsed in blank may be sued on by an agent or executor, having possession thereof, in his own name, and a judgment thereon will be *res judicata*. The question of ownership is unimportant, except defendant has an equitable defense against the true owner.

**A**PPEAL from the District Court, Parish of Iberville, *Posey, J.*

*W. B. Robertson*, for plaintiff and appellant. *Johnson, Denis, Berault & Legendre*, for defendant and appellee.

**HOWELL, J.** Wm. G. Harrison, as owner and holder of several promissory notes, made by P. C. Ricard, to the order of and endorsed by the plaintiff, his mother, and secured by special mortgage on her plantation, instituted executory proceedings against said property, which plaintiff enjoined in this action. Said notes were given in part payment of a large property, purchased by said P. C. Ricard, and in the act of sale the plaintiff intervened, and, in order to give additional security for the payment of said notes, specially mortgaged and hypothecated, "in favor of Wm. G. Harrison, in his capacity of testamentary executor of the succession of S. T. Harrison, who accepts the said mortgage, or in favor of any holder or holders of the said promissory notes," the landed property fully described in said act and belonging to plaintiff. The injunction is based upon various matters, which will be considered in the order adopted in the brief of counsel.

1. The non-observance of the forms of the hypothecary action, such as notice to the principal debtor.

The plaintiff cannot be viewed as a third person, coming into possession of mortgaged property, but as the principal obligor in the act of mortgage, which it was competent for her, under Article 3262 C. C., to execute, and she is therefore not entitled to the notice and other requisites in the hypothecary action proper.

2. The plea of discussion and the deposit of the money to defray the costs of discussion.

This plea, like the preceding, is erroneously based on the assumption that plaintiff is a third possessor. But if she were such, the plea would not avail her, as the exception of discussion cannot be opposed to creditors who have a privilege or special mortgage on the property found within the possession of a third person. C. C. 3367. C. P. 73.

3. That the mortgage granted by plaintiff is null, on the grounds of error, fraud and intimidation.

The record does not sustain this defense.

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There is no evidence of any artifices or improper practices on the part of defendant to induce the plaintiff to become the security and mortgage her property in behalf of her son. On the contrary, it is evident that it was voluntary on the part of mother and son, who are shown to have been much pleased with the purchase and the terms and conditions. It was the son, the principal obligor in the purchase, not defendant, who procured plaintiff as his security. The maxim, *volenti non fit injuria*, applies appropriately.

4. That the defendant had no right to sue in his own name to collect the notes in question; that he is not a holder in good faith, but that said notes belonged to the minor heirs of S. T. Harrison, deceased, and defendant is not their legal representative.

The notes are negotiable in form and endorsed in blank by plaintiff, and they became thereby payable to any holder, who, though an agent or executor, could sue in his own name. Hen. Dig. p. 180, No. 5. 2 A. 376. The fact that a third person is really the owner of the notes, is unimportant, except to enable the defendant in the suit enjoined, and plaintiff in this, to show an equitable defense against the true owner, which she had an opportunity to establish. The judgment on these notes against her, in favor of defendant, will be *res judicata* against any one who might afterwards claim an interest in the notes. 18 L. 92. There is nothing to impeach the defendant's good faith as holder. The evidence introduced by plaintiff herself shows that he has been discharged by the District Court as executor, and recognized as the guardian, duly appointed in Maryland, of the minors and the agent of the legatees, under the will of S. T. Harrison, deceased, and, as such, put in possession of the funds of the estate. And whether he, or those minors and legatees are the owners, is, in law, immaterial to plaintiff, if she has no equities against the true owner.

The plaintiff does not complain of the want of authentic evidence to sustain the order of seizure and sale, but that plaintiff is not the owner of the evidence on which it issued.

The injunction in this case was granted under Art. 739 C. P., without giving bond, and it has been held that damages, under the act of 1831, cannot be allowed on dissolving the injunction, as in other cases. 15 La. 101.

It is therefore ordered, that the portion of the judgment allowing damages be reversed, and that, in other respects, it be affirmed, reserving to defendant his right, if any he has, to recover damages in another action.

It is further ordered, that plaintiff pay costs of the lower Court and defendant those of appeal.

No. 1191.—CHARLES KOCK *v.* M. S. BRINGIER.

An agent authorized to endorse notes in the name of his principal, and for his use, having endorsed a note in his name, is presumed to have done so for the use of the principal.

The fact that notes are protested is not proof that the endorser thereof is insolvent.

A notary public in the city of New Orleans is authorized to appoint one or more deputies to assist in making protests and serving notices, and whatever facts come necessarily within the knowledge of the deputy, while thus assisting the notary may be certified to, and are as much evidence as though within the personal knowledge of the notary.

Notice of protest is properly served at the place of business of the party to whom it is addressed

**A**PPEAL from the District Court, Parish of Ascension, *Beauvais, J.*  
*Johnson, Denis, Bernall & Legendre*, for plaintiff and appellant.  
*Burthe & Trudeau*, for defendant and appellee.

HYMAN, C. J. Plaintiff sued defendant on a promissory note given by F. W. C. Cook, May 21st, 1861, for \$3,652 32.

It was made payable to the order of defendant, and was endorsed by Martin Gordon, Jr., as agent of defendant, before its maturity, Gordon making himself also bound on the note, subsequently to his endorsement as agent, endorsed it in blank in his own name merely as endorser. On the maturity of the note it was presented for payment, and protested for non-payment, and notice of its dishonor given to defendant and Gordon. By a written power of attorney defendant had authorized Gordon, "for defendant's use, to make and endorse promissory notes."

Defendant, in answer to plaintiff's petition, after denying all the allegations of the petition, admitted "that Gordon had authority to endorse notes for him, but only for defendant's benefit and use," and averred that Gordon's authority has ceased by his failure, before he endorsed the note sued on, and that the consideration of the note was Confederate money, the issue of rebels in arms against the Government.

There is no evidence that the consideration of the note was Confederate money, and this ground of defense is abandoned by defendant.

It being admitted by defendant in his answer, that Gordon had authority to endorse notes for his own use, and Gordon having acted within the scope of his authority by endorsing the note sued on, the presumption is that he acted for the purpose for which he was authorized, and there is no evidence in the record to the contrary.

The evidence adduced to prove the failure of Gordon, before he endorsed the note, is that several notes had been protested, on which he was endorser.

This evidence does not show that he had failed, or that it was impossible for him to pay his debts when he endorsed the note for defendant.

With no proof of Gordon's failure, previous to his endorsing the note, it is needless to determine in this case what effect the failure of an agent would have on the agency conferred on him by another.

Defendant contends that the notice is insufficient to bind him, if he be endorser, as appears from the notary's certificate of notice, the certificate being the only evidence of notice.

First, because the statement of facts made by the notary or his deputy, in the notary's certificate of notice, is not evidence.

The certificate of the notary is as follows: "I, the undersigned notary, do hereby certify that the parties to the note have been duly notified of

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the protest thereof, by letters to them by me written and addressed, dated on the day of the protest, and served on them respectively in the manner following, viz: By delivering those for M. S. Bringier, Martin Gordon, Jr., endorsers, to a clerk of the latter at his office (he not being there), by my deputy, Paul Grima, (the office of Martin Gordon, Jr., being also that of the said M. S. Bringier;)" etc.

The notices were delivered on the day when the note was protested.

The facts stated in the certificate necessarily came within the personal knowledge of the notary or his deputy, and are evidence subject to be contradicted by other evidence. 17 La. 588. Act relative to bills of exchange and promissory notes, approved March 9th 1855. The note was protested in the city of New Orleans by a notary of the city, and by law he was authorized to appoint one or more deputies to assist him in making protests and delivery of notices of protests of bills of exchange and promissory notes, and whatever facts which necessarily come within the knowledge of his deputy, while assisting in giving notices, he, the notary, may state them in his certificate, and the facts thus stated are as much evidence as if he had certified that they were within his personal knowledge. See act relative to notaries of New Orleans, 6th section, approved March 14th, 1855.

Secondly, because the notices of protest were served on Martin Gordon, Jr., who had not authority to receive such notice.

The certificate of the notary shows that notices were served on Gordon, and on defendant.

Thirdly, because the notice to defendant was not put into the nearest post-office when protest was made, addressed to him at his usual place of residence, to wit: the parish of Ascension.

Defendant, in support of this position, refers to the act relative to bills of exchange and promissory notes already referred to by us.

This act did not change the commercial law, as to the place where notice of dishonor of bills or notes were to be sent or delivered.

Notices of dishonor of a note or draft is delivered at the proper place, when delivered at the office or place of business of a party to a bill or note.

The District Judge rendered judgment against the plaintiff, and he is appellant from the judgment. The judgment is erroneous.

It is ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed.

It is further decreed, that plaintiff recover of defendant the sum of three thousand six hundred and fifty-two dollars and thirty-two cents, with interest thereon, at the rate of eight per cent. per annum, from the 24th day of December, 1861, till paid, and costs of this suit.

No. 1285.—STEPHEN BRADY *v.* WILLIAM OFFUTT *et al.*

Claimants of land under tax sales are held rigidly to show that all the requirements of law have been fully complied with. It is incumbent on them to produce the assessment and show its legality.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J. McVea & Hunter*, for plaintiff and appellant. *Fugua & Kilbourne*, for defendants and appellees.

Brady v. Offutt et al.

TALIAFERRO, J. This is a petitory action brought by the plaintiff to recover a tract of land in possession of the defendants, who, as he alleges, illegally retain the same, to his great annoyance and injury. He prays judgment decreeing him to be the owner of the land; that he be put in possession, and that defendants be condemned to pay him two hundred dollars per annum rent, so long as they continue to withhold the same.

The defendants oppose to the plaintiff's title a deed made to them by one Nonworthy, a parish tax collector, who sold the land for parish taxes in December, 1850, at which sale the defendants purchased. Judgment was rendered in the Court below in favor of defendants, quieting them in their possession; and the plaintiff appealed.

The plaintiff shows a regular chain of title from Shields, the original grantee; and he shows that Chambliss, who bought from Shields, was the owner of the land by regular conveyance of record in the parish in which the land is situated, at the time it was sold for parish taxes. The defendants introduced a certified copy of the assessment of the land for the year 1849, showing that the parish tax on the land for that year was one dollar and forty cents; and that it was assessed as the "Mooney tract." In the adjoining column of description, it is stated to contain six hundred and forty acres; its boundaries on three sides are given, and stated that it is "known as the Shields tract." They also show the act of sale made by the tax collector, in which he specifies boundaries, and designates the land sold as the "Mooney tract."

It has been settled by several decisions of this Court, that the claimants of land under tax sales are held rigidly to show that all the requirements of the law in regard to them have been fully complied with, under pain of nullity. It is incumbent upon such claimant to produce the assessment of the property, and to show the legality of the assessment. In regard to parish taxes, an ordinance of the police jury, levying the tax, was held necessary in a case very similar to this, in 16 An. 118, *Templeton v. Board of Levee Commissioners*.

Here no ordinance is shown. The assessment was made in the name of "Mooney," a non-resident, in whom no right whatever is shown to have ever existed; while it appears that, at the time of the assessment and the sale, the title of Chambliss was of record in the parish. In conformity with the well-settled rules, in relation to forced alienations of this character, we feel bound to consider the defendants' title defective, and that the judgment of the lower Court should be reversed. 6 N. S. 348. 7 L. 50. 10 L. 283. 13 L. 205. 4 An. 248. 6 An. 542. 8 An. 19. 10 An. 329. 14 An. 210.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered, adjudged and decreed, that the plaintiff have judgment in his favor, decreeing him to be the owner of the tract of land described in his petition; that he be put in possession of the same, and that a writ of possession to that effect be issued. It is further ordered that defendants and appellees pay costs in both courts.



## No. 1320.—J. B. GRAVES v. HARDESTY &amp; HARRIS.

The plea of a tender of payment in Confederate money will not avail defendant, although it was the circulating currency at the time.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J. Muse & Pipkin*, for plaintiff and appellee. *F. Hardesty and McVea & Hunter*, for defendants and appellants.

**TALIAFERRO, J.** This suit is brought on a promissory note for the sum of \$4,558 50, executed *in solido* by the defendants in favor of D. C. Hardee, executor of Ezra Stokes, deceased, dated October 12th, 1863, and made payable twelve months after date, with eight per cent. interest from date.

The defense is, that the note was given for cotton at a time when Confederate money was the only currency in circulation; that some time in 1864, in view of meeting the payment of this debt, a large amount of this cotton was sold and a tender made in Confederate money, which was refused. The defendants offered a witness to prove that the consideration of the note was Confederate money. Objection was made by plaintiff, but the objection was overruled, and the witness allowed to testify. He failed, however, to prove that the consideration was Confederate money. He stated that in the year 1864, greenback or United States money was also in circulation to some extent in that section of country, and he thought the Confederate officers used about as much of it as they did of the Confederate money.

It appears that a part of the cotton sold to the defendants was retained by the executor, and refused to be delivered until defendants gave security for the payment. The cotton belonged to the succession of Ezra Stokes, deceased, and was sold at a probate sale. The notes taken at the sale were afterwards partitioned between the widow (who subsequently married Graves) and the heirs of Stokes. An adjustment was afterwards effected by which the plaintiff and heirs were to take the cotton detained at sixty cents per pound, on a *pro rata* distribution among the holders of the cotton notes.

By this settlement another note of defendants to the estate was paid, and left a balance over of \$148 87, to be applied as a credit on the note sued upon.

We see nothing in the defense having the least weight. The plaintiff has fully made out her case, and judgment was properly rendered in her favor.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs, in both courts.

## No. 1309.—ALEXANDER WALKER v. ADELICIA ACKLEN.

Plaintiff, in his petition, alleges an indebtedness by defendant in her own right, and as tutrix to her minor children, but prays judgment against her, and has citation served on her only in her own right. A judgment against her as tutrix will not be sustained. The judgment of the Court must conform to the verdict of the jury.

**A** PPEAL from the District Court, Parish of West Feliciana, *Cooley, J. Alexander Walker and W. D. Winter*, and *D. C. Labatt*, for plaintiff and appellee. *Wickliffe & Miller*, for defendant and appellant.

Walker v. Acklen

**TALIAFERRO, J.** The record of this suit presents proceedings so anomalous and irregular, that we find it impracticable to render a decree in the case. The action is founded upon a joint contract. The petition alleges indebtedness by the defendant in her own right, and as tutrix of her minor children, and prays judgment against her in her own right alone. The defendant was not cited in her capacity of tutrix. We are at a loss to know whether the jury intended to render their verdict against both the parties alleged against, or against one of them alone. The judgment, as written up, does not seem to be sustained by the verdict. We think the ends of justice require that the case should be remanded.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled and avoided. It is further ordered, that the case be remanded to the Court of the first instance to be proceeded with according to law, with leave to the parties to amend their pleadings, the plaintiff and appellee paying costs of this appeal.

Rehearing refused.

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No. 1262.—WM. L. HUTCHINSON v. S. D. & H. RICHARDSON.

The fact of defendant being in the Confederate service, and thus avoiding citation, does not interrupt prescription.

**A** PPEAL from the District Court, Parish of St. Helena, *Ellis, J.*  
*Jas. A. Williams*, for plaintiff and appellee. *E. F. Russell*, for defendant and appellant.

*Reporter.*—This action was commenced in January, 1865, on a promissory note which became due in January, 1859. Defendant pleaded the prescription of five years. Plaintiff, in answer to this plea, produces testimony to show that defendant was in the Confederate army, and thus, by his own act, prevented the commencement of this action.

The testimony is materially as follows :

Witness *Ellis* says : "I saw defendant in Camp Moore, in the latter part of 1861; he was captain of a company in the Ninth Louisiana Regiment. I know he was still in the service in 1862."

Witness *Welsh* says : "Defendant, Hardy Richardson, was post-quarter-master from the latter part of 1863 to the surrender, in 1865."

It is admitted by defendants' counsel, that the Act of the Louisiana Legislature relative to proceedings against persons in the military or naval service of the State, or of the Confederate States, approved December 21st, 1861, was in force and recognized by the Courts as law, and as applying to this case.

**HOWELL, J.** This is an action upon a promissory note, due on 12th January, 1859, against which the prescription of five years is pleaded by H. Richardson, against whom alone judgment was rendered.

He accepted service of the petition on the 10th January, 1866, about seven years after the maturity of the note sued on, and there is no legal evidence in the record showing an interruption or suspension of the prescription pleaded.

Hutchinson v. S. D. &amp; H. Richardson.

It is therefore ordered, that the judgment appealed from be reversed, and that there be judgment in favor of defendant, Hardy Richardson, with costs in both courts.

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SAME CASE.—ON APPLICATION FOR REHEARING.

HOWELL, J. A rehearing is asked for in this case, on the ground that a motion to dismiss the appeal was not passed upon.

In the application, it is admitted that said motion was not in the record, but it was filed; and, on referring to the clerk's docket, we find an entry of the filing of a motion to dismiss, on 2d March, 1867, which motion, for the first time, comes to our knowledge on the application for a rehearing.

The appeal was made returnable, and the transcript filed, on Monday, 25th February, 1867. Court was held on each day of that week, except Saturday, March 2d, when the motion was filed. More than three judicial days had elapsed, and the motion, consequently, came too late. 17 A. 21. The case was submitted on the 4th, upon the brief of counsel for defendant—no brief of plaintiff's counsel or motion to dismiss coming into the hands of the Court—and the case decided on the 11th. Under these circumstances, we do not feel authorized to open the case for the purpose of examining a motion to dismiss the appeal.

Rehearing refused.

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No. 306.—(GEORGE H. WILEY v. WOODMAN & BEMENT.

No such proceeding as a plea in abatement, or bar to the action, is known to or recognized by our law. The execution of a judgment can be stayed only by injunction and bond.

**A**PPPEAL from the Sixth District Court of New Orleans, *Howell, J.* *Ruce & Foster*, for plaintiff and appellee. *Emerson & Huntington*, for defendants and appellants.

LABAUVE, J. This suit was brought against the defendants, upon their acceptance of a draft, payable to the order of plaintiffs, for \$500.

The defendants, for answer, pleaded a general denial and prayed for a judgment in their favor.

The Court below, after hearing the evidence, gave judgment in favor of plaintiff, for \$500, with interest and costs of suit and protest. No appeal was taken from that judgment.

But, subsequently, the defendants filed a document of the following tenor, and which they call a *plea in bar*:

"Now come the defendants in the above entitled suit, and to the Court aforesaid respectfully represent that the plaintiff ought not further to prosecute the same, or further to prosecute the writ of *fieri facias* herein issued against the defendants, because they say that the said plaintiff is an alien, born and resident in foreign parts, to wit: the State of Missouri, and out of the allegiance of the State

Wiley v. Woodman &amp; Bement.

of Louisiana and of the Confederate States of America, and within the allegiance of a foreign country and government, to wit: the country and Government of the United States of America, of which one Abraham Lincoln is President; and that said plaintiff, before and at the trial of the institution of said suit, was and now is inhabiting and residing in the said United States of America. And respondents further say, that, after and since the issuing of said writ, a public war has been commenced and proclaimed, and is now carried on and waged between the said Confederate States, within which and under the allegiance of which defendants are and reside, and the said United States of America and the Government thereof; and that the said plaintiff is an enemy of said Government of the Confederate States, and adhering to the enemies thereof, all which respondents are ready to verify; and defendants also show that, since the issuing of said writ, they have obtained a respite from their debts and creditors, by virtue of proceedings in the Sixth District Court of New Orleans, in the suit of *Woodman & Bement v. Their Creditors*, of which plaintiff had notice and was placed upon the bilan; whereupon they pray judgment that all further proceedings and writ herein be stayed and quashed, and that the plaintiff and the sheriff of the parish of New Orleans be ordered to stay all proceedings under said writ, until the plea now interposed shall be heard, and for general relief, etc."

On motion of defendants' counsel, it was ordered by the Court below that plaintiff show cause on Monday, 23d April 1861, why the order prayed for should not be granted.

The plaintiff excepted to said rule, on the ground that judgment having been obtained and execution issued, the defendants cannot set the same aside on exception, plea in abatement or rule, but only by *injunction on giving bond*; that no such process or proceeding as that instituted by defendants is known under our law in such cases.

The Court below, after hearing counsel, sustained the exception of plaintiff and dismissed the rule or plea in bar filed by defendants, with costs.

The defendants appealed from that judgment.

We are clearly of opinion that the District Judge did not err. The appellants have not appeared in this Court to point out to us the law authorizing such proceedings as by them adopted to arrest the *fieri facias* or execution upon the judgment, and we are not aware of any laws under which said writ or execution could be arrested, except those regulating injunctions, and requiring the party to state under oath the facts which, according to his belief, render necessary, and to annex to his petition his bond in favor of defendant in injunction. C. P. Arts. 296, 304.

The appellee has asked for damages as for a frivolous appeal. We believe he is entitled to them.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, with fifty dollars damages, and that the appellants pay all costs.

HOWELL, J. recused.

## No. 1257.—E. FENDLER v. MARY C. DAIGRE et als.

Where a tutrix, administering, acknowledges in her account that the heirs are her creditors, and it is evident that she is indebted to them. The judgment homologating the account cannot be annulled. But it may be reduced by the creditors, if they show that the whole sum allowed is not due.

The husband's separate property, being adjudicated to the widow as a part of the community, the subsequent creditors of the widow cannot treat the adjudication as an absolute nullity.

**A** PPEAL from the District Court, Parish of East Baton Rouge, *Posey, J. Burgess, Chaney & Joor*, for plaintiff and appellant. *S. P. Greves* and *A. M. Dunn*, for defendant and appellee.

**HOWELL, J.** On the 21st February, 1866, plaintiff instituted this suit against Mrs. Mary C. Daigre, individually, and as tutrix of her minor children, Mary E. Gilbert, A. and Lucie A. Daigre, and against the said three children, to obtain judgment *in solido* against and set aside the probate proceedings and sales in the succession of Gilbert Daigre, deceased, resulting in a settlement between the said tutrix and minors, and to subject the property, transferred to or purchased by the latter in pursuance thereof, to the payment of a note and account held by plaintiff against the said Mrs. Daigre, on the grounds of fraud and collusion.

The petition sets forth that during the year 1862, plaintiff sold to Mrs. Daigre, for herself and her said children, various articles of jewelry amounting to \$2,809 50, of which sum Mrs. Daigre paid \$1,000, on 12th October, 1863, and gave her note due at twelve months for the balance, and that in October and November, 1865, he sold to them other merchandise amounting to \$74 45; that at the dates of the first sales the defendants were wealthy, and the owners of a large amount of property; that for the purpose of concealing her property from the pursuit of her creditors the said Mrs. Daigre fraudulently acknowledged herself indebted as tutrix to her said children, about two thousand dollars, more than she really owed them, and caused judgment to be rendered against herself in their favor for ninety-four thousand six hundred and thirty-six dollars and ninety-seven cents, or \$31,878 39 to each—whereas she did not owe them so much by \$39,450, amount of the separate property of their father; that under said judgment defendants caused a large amount of property to be sold below its real value, and the proceeds, with other sums paid, exceeding by at least \$1,000, her true indebtedness, applied to said judgment.

The three children excepted that no cause of action against them was shown; that no priority of contract is pretended between plaintiff and exceptors, in the execution of the note sued on; that the record in the succession of their father, referred to by plaintiff, shows that their rights were fixed and determined by the account filed by the tutrix on 21st March, 1861, which was homologated by judgment of the Court—the portion falling to one of them, Mary E., wife of Von Phul, having been paid in full in January, 1861, and that, at all events, no action lies against them until recourse upon their mother is exhausted. These exceptions were overruled, and were renewed as a defense by all the defendants, with a general denial, and the averment that plaintiff cannot maintain his action, as the rights of the children were judicially ascertained prior to the origin of the debt on which the suit is based. They further



pleaded the prescription of one year, in bar of the action; but this plea is not urged in this Court.

Judgment was rendered against Mrs. Mary C. Daigre for the amount of the note sued on, and against plaintiff on his demand against the heirs, and he has appealed.

There seem to be irregularities in the probate proceedings in the succession of Gilbert Daigre, deceased; but the evidence does not sustain the charge of fraud and collusion.

The alleged fraud is stated to have its origin in the account filed by the tutrix on the 21st March, 1861, where no apparent motive existed for committing a fraud. By the authority cited by plaintiff, the judgment homologating this account cannot be annulled, as it is evident the tutrix was indebted in a large amount to the heirs; but it may be reduced by her creditors, if they show that the whole sum allowed is not due. See 5 A. 715.

The record shows that the mother owed her children more than she has paid them by ten thousand dollars, the excess stated by plaintiff.

His suggestion that she could not have owed them as much as allowed by the amount of the husband's separate property, which was included therein, cannot avail him in the form in which he has brought his action, while the adjudication of that property, as well as the community property, to the widow is not set aside, which he has not asked to be done, and while it stands undisturbed the judgment attacked is not erroneous in amount. The creditors or heirs of the deceased may complain of it, but plaintiff, who is a posterior creditor of the mother, cannot do so, unless the effect be such as to deprive him of some legal right upon his debtor's property.

But such effect is not shown, as by the act of adjudication the general mortgage of the minors was removed and a special mortgage granted on the plantation, which had belonged to the community, and which, when sold under that mortgage, did not yield as much as plaintiff admits was due the minors.

We are of opinion that the subsequent creditors of the mother and tutrix cannot treat the adjudication to her of the husband's separate property as an *absolute nullity*, and deprive the heirs who do not complain of all recourse against their mother for its value, which is adjudged to them by a formal judgment of Court. In this case, where plaintiff dealt with the mother, and to whom alone it is shown he gave credit, she was, so far as this record shows, the owner of all the property described in the inventory, and her only indebtedness was to two of the heirs, who it appears have not yet obtained from her the whole of that indebtedness.

As plaintiff has failed to make out a case against the heirs, and as he may be able in another form of action to show their liability, we have concluded to change the judgment against him to one of nonsuit.

It is therefore ordered, that the judgment against plaintiff on his demand against Levoir Daigre, Gilbert Daigre and Mary E. Daigre, wife of Henry Von Phul, be reversed, and that there be judgment against him thereon as of nonsuit; that the judgment against Mrs. Mary C. Daigre be affirmed, and that the costs of appeal be paid by the said Levoir, Gilbert and Mary E. Daigre, appellees.

No. 552.—VALENTINE ST. CERAN *v.* J. A. SHERMAN—L. BERNARD, Garnishee—W. N. ROGERS, Intervenor.

Plaintiff garnishees \$3,000 belonging to defendant, which had been deposited with a third party pending the issue of a horse race; afterwards an intervenor claims the money, as having won it at the race. Defendant is shown to have been an insolvent at the time of seizure. The Court will not sustain the intervention.

**A**PPEAL from the Sixth District Court of New Orleans, *Leumond, J.* Durant & Hornor, and J. P. Hornor, for plaintiff and appellee. Geo. L. Bright, for defendants and appellants.

LABAUVE, J. This case is on a rehearing.

The plaintiff and appellee obtained a judgment against the defendant, on the 18th November, 1862, for \$2,300, with interest and costs. Several writs of *fiery facias* issued, and the judgment was partly satisfied, leaving, however, a balance due of upwards of \$1,500.

On 7th June, 1864, plaintiff issued another execution, and filed a supplemental petition with usual interrogatories, and levied a seizure in the hands of L. Bernard, who was made garnishee.

L. Bernard, the garnishee, in answer to the interrogatory whether he had in his hands money, rights or credits belonging to the defendant Sherman, said:

"No; except such rights as may result in favor of J. A. Sherman, from a certain agreement in writing, made between W. N. Rogers and J. A. Sherman, a correct copy of which is now hereto annexed, and made part of these answers. In compliance with that agreement, Mr. W. N. Rogers deposited with me \$2,000 in currency.

|                                                                                     |               |
|-------------------------------------------------------------------------------------|---------------|
| Mr. J. A. Sherman deposited with me eight half Spanish doubloons, representing..... | \$100         |
| Sixty-five dollars, Spanish gold coin.....                                          | 600           |
| In notes currency.....                                                              | 500           |
|                                                                                     | <hr/> \$1,200 |

W. N. Rogers intervened, and alleged that neither J. A. Sherman nor Valentine St. Cerau had any right or interest in the moneys described in the garnishee's answers, but that the same belonged to the intervenor and claimant. That on the 11th June, 1864, he made a match race with J. A. Sherman, and subsequently reduced to writing, a correct copy of which is annexed to the garnishee's answers; that he fully complied with all the stipulations and conditions of the bet, and that on the 15th June, 1864, the horse Reube Rynders, named by him, won the money without any opposition.

He prayed that the rule of Valentine St. Cerau be dismissed, that judgment be rendered in his favor, and against L. Bernard for the money so deposited by J. A. Sherman.

To this intervention the plaintiff answered that on the 7th June, 1864, date of the seizure in the hands of Bernard, there existed no relation of debtor and creditor between Rogers and Sherman; that if there was

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any agreement between them prior to said seizure, to run a horse race, the same was canceled by said seizure; that the wager set up by Rogers was illegal as well as excessive and ruinous in amount, and reprobated by law; that Sherman was at the date of the bet in insolvent circumstances, and had denied property on the execution against him, and was debarred in law and good morals from disposing of his property in that manner.

The Court below, after hearing the evidence, gave judgment for plaintiff, and the intervenor took this appeal.

The bet was \$5,000 by W. N. Rogers, against \$3,000 by J. A. Sherman. The \$1,200 deposited by Sherman, and the \$2,000 on Rogers' part, were put up as a forfeit—the race to be run on the Fair Grounds course; the money was deposited in L. Bernard's hands. The \$1,200 deposited as a forfeit by Sherman was seized, and L. Bernard garnisheed before the day appointed for the race. On that day Rogers' horse run; Sherman produced no horse; the judges declared that Reube Rynders, Rogers' horse, won the race. Rogers had put up the \$5,000, according to agreement.

This case involves but one question of fact, which must be tested by the means and circumstances of Sherman, under Article 2952 of the Civil Code, which permits horse racing, but allows the judge to reject the demand when the sum appears to him *excessive*. Now, was the amount excessive for Sherman?

The following admissions were made below by the parties:

"That this is a suit originally instituted on two notes, on the 6th October, 1862; that after issue joined, judgment was rendered on the 18th November, 1862, and signed November 22d, 1862; that several writs of *hæri facias* have issued against defendant, and been returned not fully satisfied after due and legal demand; that there now remains more than \$1,500 due on said judgment."

The testimony clearly satisfies us that Sherman, at the time of this bet, was insolvent; that his horses had been seized and sold, and it was not known what he was doing for his living; two or three years before the trial below, he was keeping a truss store, and one witness thinks that store was sold out by the sheriff.

The term, "*excessive*," is used by the code in a *relative* and *comparative* sense; for instance: \$3,000 would be very little for a wealthy man, but it was an *excessive* and large amount for Sherman, who could not pay his debts, having judgments and executions hanging over his head without apparent means wherewith to pay them.

Taking all the circumstances into consideration, we are of opinion that the judgment rendered below is in compliance with the laws and the facts of the case.

It is therefore ordered and decreed, that our former decision be set aside, and that the judgment appealed from be affirmed, with costs.

## No. 461.—FRANK MALLERICH v. GEORGE MERTZ.

The charge against plaintiff that he had sworn falsely, and the calling him a swindler and thief, amount to a presumption of damage.

**A**PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*E. J. Wenck*, for plaintiff and appellee. *Cyprien Dufour*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiff sues the defendant for slander and claims \$5,000 damages. The defendant puts in a general denial, and adds, that if any such words were used by him as those charged in plaintiff's petition, they were not spoken with malicious intent, and that plaintiff was not thereby injured. In the Court *a quo* judgment was at first rendered in favor of the plaintiff for five hundred dollars, but it was afterwards, upon a new trial, reduced to two hundred dollars. From this judgment the defendant has appealed.

It seems that the defendant, having issued an execution upon a judgment he had obtained against one Roesk, had caused to be seized a coffee-house and the stores it contained, as the property of his debtor. The plaintiff interfered by injunction, claiming the property as his own. This excited the ire of the defendant, who, it is shown, used on several occasions opprobrious epithets in speaking of the plaintiff—calling him a swindler and thief, and saying that he had committed perjury. No damages are proved; but the charge against the plaintiff that he had sworn falsely, and the calling him a swindler and thief, amount to a presumption of damage. There is no fixed rule, in cases of this sort, of assessing damages, and we see no reason to alter the judgment which, with the evidence before it, and in the exercise of a sound discretion, was awarded by the Court below. Civil Code, Arts. 1928, 2294. 14 La. 198. 10 An. 231.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HOWELL, J. recused.

## No. 902.—J. BAER v. KOPFLER.

To entitle a party to the rigorous remedy of sequestration, the affidavit must state either that he has a privilege on the property, or that he is the owner of it. C. P. Art. 275.

**A**PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*Sheldon & Pardee*, for plaintiff and appellee. *Belden & Fuselier*, for defendant and appellant.

Baer v. Kopfler.

HOWELL, J. Plaintiff alleges that, in April, 1865, he formed a partnership with defendant, for carrying on the business of sutlers to a United States regiment, by which he was to furnish the capital, defendant the "appointment of sutler" to the regiment, and both were to unite their labor and share equally the profits and losses; that he advanced \$5,000 in said business; that, in September, 1865, their partnership was dissolved by the seizure and confiscation of their goods by the commanding officer at the "post," and by mutual consent; that, at the time, the assets consisted of \$1,415 cash in his hands, \$553 in the hands of defendant, a claim of \$398 against said commanding officer for his wrongful seizure, and notes and accounts against the members of said regiment, amounting to \$2,700; that, at his instance, the defendant, in October, 1865, collected said amount from said officer, and the sum of \$135 on said notes and accounts, which the latter took into his possession and refuses to settle for or return, but threatens to collect; that, to defraud plaintiff, the defendant invested said sums thus collected in a grocery store in this city, for his own account; that, upon a settlement of the partnership, defendant will owe him \$1,086 in cash, and one-half of the loss of capital; that said groceries really belong to the partnership; that he fears the defendant will dispose of the same, and collect or dispose of said notes and accounts; and prays for a sequestration of said assets, for their proceeds to be paid to him, and for judgment against defendant for \$2,500, due on account of said partnership.

He made oath to the truth of the petition; the grocery store was sequestered, and released on bond given by defendant.

No exception was made to the character of the action; but a motion was made to set aside the sequestration, on the grounds that the affidavit was insufficient, and that plaintiff claims no privilege or ownership of the grocery store; which rule was dismissed, and a general denial was pleaded.

We think the lower Court erred in sustaining the sequestration. The petition does not set forth the conditions for the writ, required by Art. 275 C. P., or any amendment thereof. It shows that the grocery was purchased *after* the dissolution of the partnership, and does not allege that defendant claims the exclusive ownership of the notes and accounts in his hands, but that the latter held them for collection, and the fear that he would not pay over.

A sequestration, being a rigorous measure, will be allowed only when the party is clearly entitled to it. 2 A. 961. 9 A. 535.

It seems that the parties carried on the business of sutlers, for a few months, as partners; but the evidence does not enable us to declare defendant indebted in any particular sum to plaintiff, as charged in the petition.

The District Judge gave judgment against him for \$652; composed of \$238, acknowledged by him (in a letter) to be in his hands, in August, 1865; \$392, collected from the commanding officer, and \$16 collected from other parties.

The letter referred to shows that he had the first item, and proposed closing their partnership then, upon condition of retaining said sum as his share, but it seems that they continued their business for a month



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longer, and there is nothing to raise the presumption that he retained this particular amount. As to the other two items, the evidence is too vague to authorize a judgment. In answer to interrogatories on facts and articles, defendant declares that he did not collect from said parties enough to pay his expenses. The countervailing evidence is too indefinite of itself to overcome these answers.

We cannot say that the partnership is shown, in this record, to be settled, so as to make defendant a debtor to plaintiff in any amount.

It is therefore ordered that the judgment of the lower Court be reversed, and that there be judgment against plaintiff, as of nonsuit, with costs in both courts.

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No. 1304.—GARTHWAITE, WHEELER & Co. v. JOHN K. WENTZ et als.

Plaintiffs obtained judgment against defendant, and others, in 1861: afterwards, plaintiffs' attorney acknowledged satisfaction thereof, on receipt of the amount in *Confederate money*: *Held*—That the attorney had no right to receive such paper in payment of his clients' judgment, without their consent, and that the judicial mortgage must be reinstated of record.

**A**PPEAL from the District Court, Parish of St. Helena, *Ellis, J.*  
*D. N. Hennen*, for plaintiffs and appellants. *J. F. Wilson, James Welch* and *T. G. Davidson*, for defendants and appellees.

**LABAUVE, J.** On the 2d August, 1861, the plaintiffs obtained a judgment against John G. Burton and Thomas K. Gannon for \$500, with interest. On the 23d June, 1862, Henry L. Daigre, the attorney of plaintiffs in that suit, acknowledged satisfaction of judgment, as shown by a receipt of the following tenor:

“Received from H. E. Williams, clerk, the sum of \$540 in *Confederate money*, in full of the judgment, principal and interest, rendered in this case.

June 23d, 1862.

(Signed)

H. L. DAIGRE, Attorney.”

This suit is now brought on the ground that the attorney had no authority to receive in payment that kind of currency, and set aside said satisfaction of judgment as being illegal, and to correct the erasure of the judicial mortgage, and to reinstate said mortgage on record.

The Court below, after a hearing, gave judgment for defendants, and the plaintiffs appealed.

We are of opinion that the District Court erred. The mode of payment in treasury notes of the Confederate States of America, was clearly proven, and the attorney had no right to receive such papers in payment of his clients' judgment, without their consent. *Dunbar v. Morris*, 3 R. 278; *Perkins v. Grant*, 2 A. 328; *Railey & Campbell v. Bagley*, lately decided.

Garthwaite, Wheeler &amp; Co. v. Wentz et als.

It is therefore ordered and decreed, that said satisfaction of judgment and cancelment of the judicial mortgage be annulled and avoided, and that said judicial mortgage be reinstated of record, and that the defendants and appellants pay costs *in solido*, in both courts.

No. 949.—AMELIA MICHAEL *v.* H. V. BABIN, Sheriff et als.

Where an appeal is granted by motion in open Court, the names of the appellees must be inserted in the appeal bond, otherwise the appeal will be dismissed.

**A**PPEAL from the District Court, Parish of East Baton Rouge, *Posey, J. Burgess, Chaney and J. Joor*, for plaintiff and appellee. *J. J. Burk*, for defendants and appellants.

HYMAN, C. J. The plaintiff has filed a motion to dismiss the appeal on the ground that the appeal bond is defective, it not being made in favor of any one.

The order of appeal was granted, on motion, in open Court.

In 12 Robinson's Reports, page 205, it was decided that there is no other way, when an appeal has been granted on motion in open Court, to compel appellees to take notice of an appeal, and to appear before us, than by including their names in the appeal bond.

The appeal bond should have been given in favor of the appellee.

Let the motion be sustained, and let the appeal be dismissed.

No. 1192.—JAMES N. LEA *v.* M. S. BRINGIER.

The fact that a debtor is under protest and does not pay his debts, does not establish his insolvency.

It must be shown that he has not the means of paying his debts, by showing that all his property and credits are not equal in amount, at a fair valuation, to the debts due by him.

If a party is capacitated to act for himself, he may act in the capacity of agent for another.

**A**PPEAL from the District Court, Parish of Ascension, *Beauvais, J. Johnson, Denis, Bervault & Legendre*, for plaintiff and appellant. *Burthe & Trudeau*, for defendant and appellee.

LABAUVE, J. This suit is brought to recover from the defendant \$1,000,

evidenced by a note dated 23d January, 1862, purporting to be signed by Martin Gordon, as agent of said defendant.

The answer contains a general denial, and an allegation that the power of Martin Gordon was canceled by his failure, in about February, 1861, and that therefore he had no authority to sign the name of defendant; that the note was discounted by plaintiff at a time when there was no other circulation except Confederate notes, and under the implied contract that said note, at maturity, would be paid in the same issue; that Confederate notes were issued for the purpose of subverting the Government of the United States, and the contract was against good morals and for an illegal consideration; that there was failure and want of consideration.

The District Court, after hearing the evidence, gave judgment for defendant against plaintiff, who took this appeal.

On the 27th day of March, 1860, by notarial act, passed before Thomas J. Beck, notary public in New Orleans, the said defendant appointed the said Martin Gordon, Jr., to be his true and lawful attorney "special," granting unto said attorney full power, for him and in his name, to his use and in his behalf, to draw checks or drafts for the payment of money, upon any bank or banks, person or persons. \* \* \* And in his name and to his use, to make and endorse promissory notes, and to make notes payable to the order of *Martin Gordon, Jr.*, either for the use of said Gordon or for the use of said M. S. Bringier, and to draw and endorse bills of exchange, and to make and give any note or notes which may be necessary from time to time, in renewal. \* \* \*

The testimony shows that Martin Gordon, Jr., went to protest as endorser, on one note, in May, 1861; that he was a sugar and cotton factor before he went to protest; that he suspended payment in May, 1861; that this suspension was of public notoriety in the commercial community; that said Gordon has not paid his obligations, and is no longer doing a commercial business.

On trial of the case below, defendant offered to prove by Bernard Avegno and Binder, that the note sued upon was discounted by said Binder & Avegno, as brokers, to James N. Lea; that the consideration paid for said note was Confederate treasury notes, and that there was no other currency at that time. Plaintiff objected, on the ground that there was no allegation in the answer that the consideration of the note sued upon was Confederate Treasury notes. The Court sustained the objections, and a bill of exceptions was taken to the opinion of the Court. We are of opinion the Court ruled correctly. The allegation in the answer, in regard to Confederate treasury notes, did not authorize the admission of the testimony.

There is but one question in the case: Had Martin Gordon *failed*, in the sense of Art. 2996 of the Civil Code, reading thus:

"The procuration expires: \* \* \* By the death, seclusion, interdiction or *failure* of the agent or principal."

*Failure* signifies the situation of a debtor who finds himself in the impossibility of paying his debts. C. C. (signification of terms) Art. 15.

The mere fact that a debtor is under protest and does not pay his debts, is not a proof of insolvency; it must be established that he has not the

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means of paying them, by showing that the whole of his property and credits are not equal in amount, at a fair appraisement, to the debts due by him. C. C. Art. 1980. Although Martin Gordon was under protest as endorser on one note, and had suspended payment in May, 1861, he might have had property and assets exceeding largely the amount of his liabilities. He had yet the power of controlling and selling his property. *Thompson v. Gordon*, 12 La. 260.

If he could act for himself, we see no good reasons why he could not also act as agent of the defendant, who, it seems, remained silent instead of revoking his power, as he had the right to do. C. C. Art. 2997. Besides, there is no evidence in the record, of knowledge in the plaintiff, of the state of affairs of Martin Gordon.

We are of opinion that plaintiff has made out his case in all respects, and that the judgment appealed from is erroneous and must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed. It is further adjudged and decreed, that the plaintiff, James N. Lea, recover of the defendant, M. S. Bringier, the sum of one thousand dollars, with interest at the rate of eight per cent. per annum, from the 26th January, 1863, till paid, and costs of suit in both courts.

No. 301.—LOUIS FOLSE et als. v. NEW ORLEANS COAST AND LAFOURCHE  
TRANSPORTATION COMPANY.

The responsibility of a common carrier, in transporting slaves, is of the nature of that assumed in carrying passengers, and not packages. If loss occurs the carrier is responsible only for negligence or unskillfulness.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*Johnson & Denis*, for plaintiffs and appellees. *Frank Haynes*, for  
defendants and appellants.

**LSLEY, J.** The defendants are sued as common carriers for the value of a slave of the plaintiffs, which it is averred the said defendants undertook to convey on their steamboat *Musie*, from New Orleans to the plaintiffs' plantation, on Bayou Lafourche, and which they failed to deliver.

The lower Court gave judgment against the defendants, who have appealed.

The slave was a runaway, and was received on board the boat by the captain, who promised to have an eye on him, and he was fastened by handcuffs to the hog-chain of the boat on the boiler deck. One of the

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officers of the boat says that "the slave asked to go to the privy, and that the porter took charge of and accompanied him, both his hands being in the handcuffs, of which the porter had the key."

The officer says he accompanied him a part of the way to the privy, the porter of the boat, a colored man, being close upon him, and holding him by the tail of his coat; that as the slave went round by the barber's shop, the officer lost sight of him, and that almost instantly afterwards the porter turned back with the boy's coat tail in his hand; that the officer proceeded at once to the privy, but saw no more of the boy. Immediate search was made for him, but without effect. That there is a railing along the side of the barber's shop. The witness represents the porter as perfectly trustworthy. The boat was landed at the time at the plantation of Capt. Dugas, a little below Donaldsonville, and a passenger testifies that the porter, who had charge of the slave, came running on the front deck where the witness was standing, and said that the slave had jumped overboard.

There is no difference between the provisions of our code and the principles of the law of bailment applicable to common carriers, which prevail in the other States. Their liabilities are the same under articles 2722 and 2725 of the Civil Code, as those defined in cases reported, particularly in *Wendell* 236, 251; 21 *Wendell* 153, 354, and in the case of *Baldwin v. Collins*, 9 Rob. 568. (See *Logan v. The Pontchartrain Company*, 11 Rob. 26, 27), and it has been distinctly held that the law regulating the responsibility of common carriers does not apply to the case of carrying intelligent beings, such as negroes. The Court, in the case of *Boyce v. P. Anderson*, 2 Peters, page 150, in enunciating this principle, said: "The carrier has not, and cannot have over slaves the same absolute control that he has over inanimate matter. In the nature of things they resemble passengers, and not packages of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods."

If, in the present case, the plaintiffs sustained any injury by the loss of their slave, whose value was proved, the defendants would only be responsible for that injury, by the negligence or unskillfulness of themselves or their agents, and we can perceive no reason under the facts proved thereon, to charge them with either the one or the other. The judgment of the Court below should have been in favor of the defendants.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and it is further ordered, that judgment be and it is hereby rendered in favor of the defendants and against the plaintiffs, and that the plaintiffs pay the costs in both courts.

HOWELL, J. recused.



## No. 199.—HOOPES &amp; TOWNSEND v. DAVID C. McCAN.

Where the creditors of a commercial partnership make settlement with the liquidating partner after the dissolution, and take his separate notes in full settlement of their claim, and it appears that they were at the time aware that the liquidating partner had assumed all the liabilities of the partnership, the retiring partner will not afterwards be held responsible.

**A** PPEAL from the Second District Court of New Orleans, *Morgan, J. Clarke & Bayne*, for plaintiff and appellee. *Durant & Hornor*, for defendant and appellant.

**LABAUVE, J.** This suit is brought against the defendant for \$1,398 65, with interest at seven per cent., from the 12th March, 1860, for goods sold and delivered to the commercial firm of McCan & Patterson, on a credit of six months, expiring 17th March, 1858, with a credit of \$225, paid 12th March, 1860, leaving the balance due as aforesaid.

The answer contains, in substance, a general denial, and that, if any indebtedness ever existed, which is denied, the partnership of McCan & Patterson, of which respondent was a member, was dissolved on the 17th May, 1858, and that plaintiffs had notice thereof; that by the terms of said dissolution, all the debts of the said firm were assumed by George Patterson; that all the partnership property was left in his possession for the purpose of paying said debts; that respondent withdrew from said firm on the said date; that on the 12th March, 1860, the plaintiffs received from George Patterson \$225 in cash, and his note at six months for \$721, and his note at twelve months for \$742, in full settlement of claim of Hoopes & Townsend, of Philadelphia, against the late firm of McCan & Patterson; that it was the intention of plaintiffs, in thus settling with George Patterson, the liquidating partner, to grant a full and entire acquittance to respondent; that said Patterson had always ample means and partnership effects with which to pay any such indebtedness, if owing prior to his death, and that the delay of plaintiffs in looking to this respondent, their giving a long time to Patterson to pay the injury inflicted upon respondent, all debar them from any recovery herein; that plaintiffs' claim, if any they have, is not yet due and payable, and that this suit is therefore premature; that plaintiffs cannot recover of defendant, from their inability to subrogate him to all their legal rights.

He prays for judgment in his favor, for costs and for general relief.

The receipt given in settlement is of the following tenor:

"Received, New Orleans, March 12th, 1860, from George Patterson, two hundred and twenty-five dollars in cash, and his note payable six months after date, with current exchange on Philadelphia, for seven hundred and twenty-one dollars, and his note payable twelve months after date, with current exchange on Philadelphia, for seven hundred and forty-two dollars, being in full settlement of claim of Messrs. Hoopes & Townsend of Philadelphia, against the late firm of McCan & Patterson, the said claim being on the schedule of liabilities of McCan & Patterson, on file in the office of James Graham, Esq., notary public in the city of New Orleans.

(Signed)

HOOPES & TOWNSEND."

On the 17th May, 1858, the partnership of McCan & Patterson was

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dissolved by public act passed before Graham, notary public. McCan, the defendant, transferred and sold to Patterson all his rights, titles and interest he had in the property and effects belonging to his said partnership, and the purchaser, Patterson, assumed and bound himself to pay all the debts and liabilities of said firm. The list referred to in the above receipt, and annexed to the notarial act, shows assets to the amount of \$35,934 82, and liabilities assumed by Patterson to the sum of \$21,990 31, among which figures the debt due the plaintiffs, \$1,450. The purchaser settled the difference, \$15,000, in cash and in his notes. The plaintiffs must have had knowledge of this dissolution and arrangement, for they refer to the said list of debts in the receipt given by them; therefore, they knew that Patterson had assumed their debt.

The question arises, was this receipt intended as a payment or novation of the debt due by McCan & Patterson, in using the term *full settlement*? Taking all the attending circumstances, we are of opinion that *full settlement* was intended for payment; because, in reference to the \$225 paid cash, it certainly means payment, and of course must have the same meaning as regards the two notes. Settlement means: an adjustment of accounts or claims; liquidation; payment. Worcester's Dict. *verbo settlement*.

If then the term in *full settlement*, and by the plaintiffs in their receipt meant payment, the debt owing by the firm of McCan & Patterson was novated and extinguished. 4 An. 543. 2 An. 174. 16 L. 140. 2 L. 111.

We are of opinion that our learned brother below erred in giving judgment for plaintiffs.

It is therefore ordered and decreed, that the judgment appealed from be reversed and annulled, and it is further adjudged and decreed, that plaintiffs' demand be rejected, and that they pay costs in both courts.

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No. 264.—CULVER, SIMONDS & Co. v. HENRY J. LEOVY, LUCIUS C. DUNCAN  
AND THE NEW ORLEANS DELTA NEWSPAPER COMPANY.

A general power given to the business manager of a corporation, does not authorize him to bind the corporation as drawer of a promissory note.

A promissory note is drawn to the order of two persons and endorsed by both : they are jointly liable, but are not bound *in solido*.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*Race & Foster*, for plaintiffs and appellees. *Leovy & Duncan* and  
*Robert Lovelace*, for defendants and appellants.

HYMAN, C. J. The New Orleans Delta Newspaper Company, a chartered corporation, was sued as maker, and Henry J. Leovy and Lucius C. Duncan were sued as endorsers, by plaintiffs, on a promissory note, made and executed by the business manager of the corporation, Henry J. Leovy.

The note was drawn as follows, to wit :

Culver, Simonds &amp; Co. v. Leovy et als.

"\$1,125.

NEW ORLEANS, May 10th, 1860.

"Six months after date, we promise to pay to the order of Henry J. Leovy and Lucius C. Duncan, one thousand one hundred and twenty-five dollars, value received, with interest, at the Canal Bank, in New Orleans.

HENRY J. LEOVY, Business Manager of Delta."

The note was endorsed in blank by Henry J. Leovy and Lucius C. Duncan.

Presentment and demand of payment of the note was made at its maturity, and, on payment being refused, it was protested for non-payment, and due notice of its dishonor given to Leovy and Duncan.

The District Judge, on the 1st of March, 1861, rendered judgment against Leovy and Duncan, condemning them *in solido* to pay plaintiffs the amount of the note, with interest and costs; and on the 2d day of the same month he also rendered judgment against the corporation, condemning it likewise to pay to plaintiffs the amount of the note, with interest and costs.

All the defendants have appealed from these judgments.

The act of incorporation, which was introduced in evidence, declared that the purpose for which the corporation was established was to publish a newspaper, to maintain and conduct a job printing office, to do all acts connected with the printing and publishing business, and to purchase the "paper" and "office," and all things necessary for the same.

The act further declared, that all the powers of the corporation should be exercised by two managers and some clerks.

One of the managers to be the manager of the editorial department, and the other manager to be the manager of the business department, who was to attend to all things connected with the business department, and was the only person authorized to contract for the corporation, or to bind it in any manner whatever.

No other power or authority was given to the business manager.

Leovy was appointed business manager of the corporation.

This authority did not authorize Leovy, the business manager, to bind the corporation in this peculiar manner.

To enable plaintiffs to recover judgment against the corporation, they should have produced evidence that Leovy had special authority to draw the note, or its equivalent, to wit: that the making of the note by the business manager was necessary to effect the objects for which he was appointed. C. C. 2966. 6 La. R. 590.

The judgment against the endorers is also erroneous.

Though it is not proved that the corporation is the maker of the note, the defendants, by their endorsements, have acknowledged that the corporation is the maker, and they are as liable to the plaintiffs as if the business manager had authority to sign and make the note for the corporation.

As to them, the note is proved to have been made by the corporation, and by the note they became the joint creditors of the corporation.

By their endorsements they became joint debtors, not debtors *in solido*, to the holders. See 3 La. 438. 4 Rob. 18.

It is contended that, as the plaintiffs made the note a part of their petition, and as there is an endorsement in blank on the note, made by an

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agent, subsequent to the endorsements of defendants, the authority of the agent should be proved before the plaintiffs can recover judgment. As it was unnecessary for plaintiffs to make such averment, it was also unnecessary to prove the averment. See 2 An. 331.

We do not deem it necessary that the endorsements made subsequent to those of defendants should be struck from the note before plaintiffs can have judgment against the defendants on the note.

It is ordered, adjudged and decreed, that the judgments of the District Court be annulled, avoided and reversed; it is further decreed, that the suit of plaintiffs be dismissed at their cost, as to the defendants, The New Orleans Delta Newspaper Company. It is further decreed, that plaintiffs recover from Henry J. Leovy and Lucius C. Duncan, jointly, the sum of one thousand one hundred and twenty-five dollars, with five per centum per annum interest thereon, from 10th day of May, 1860, till paid, and six dollars and five cents, cost of protest.

It is further decreed, that plaintiffs have judgment against the said Leovy and said Duncan, *in solido*, for the costs of suit against them in the lower Court. The plaintiffs to pay the costs of appeal.

HOWELL, J. recused.

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No. 287.—GIFFEN, SMEDES & Co. v. IRA L. MANNING.

Where the proceedings are *in rem* founded on a privilege, the defendant cannot except to the jurisdiction of the Court, on the ground of his domicile being in a different parish from that where the seizure is made.

A privilege follows the object to which it is attached, and the creditor may have the object seized by a writ of sequestration, in whatever part of the State it may be found, whether at the owner's domicile or not.

Where plaintiff claims a privilege on cotton, or other property, and has it sequestered in a different parish from that of the domicile of the defendant, the personal action will be dismissed and the action *in rem* maintained.

**A** PPEAL from the Fourth District Court, of New Orleans, Price, J. D. C. Labatt, and Hyams & Jonas, for plaintiffs and appellants. Eggleston & Hart, for defendant and appellee. Durant & Hornor, for intervenors.

LABAUVE, J. On the 30th March, 1861, the plaintiffs and appellants, residing in this city, filed this suit against the defendant, a planter and resident of the parish of Carroll, alleging in substance, that petitioners, being the commission merchant of the said Ira L. Manning, had made advances to him during the years 1860 and 1861, under special agreement that the said Manning would ship his crops of cotton to them; that, in accordance with said agreement, petitioners had advanced to him at divers times, more particularly set forth in the account annexed and made part of the petition, large sums of money, supplies and provisions; that the amount now due by defendant is \$25,340 61, as appears by reference to said annexed account, and the further sum of \$18,326 21, not yet due, being for acceptances; that said Manning agreeably to said agreement, has shipped to petitioner a portion of his crop, but that he has shipped

the latter part thereof to West, Renshaw & Cammack, merchants of this city, and is about to divest the proceeds thereof, in order to defeat petitioners' lien and privilege accorded by law, and to deprive them thereof pending this suit.

They prayed for a writ of sequestration, directing the sheriff to seize and take in his possession the several bales of cotton raised and shipped by said Manning, to West, Renshaw & Cammack, and now in their possession; that said Manning be duly cited to answer this petition, and that, after due proceedings had, petitioners have a judgment for \$43,666 82, with interest, and for privilege on the property sequestered or its proceeds, and for general and equitable relief.

The defendant appeared by an attorney, who filed the following exceptions:

"The defendant, by his counsel, comes only for the purpose of pleading exceptions to the jurisdiction of this Court and the premature institution of the suit on the demand not due, and excepts:

"1. That no property has been legally sequestered and held in custody of the officer or Court, to confer jurisdiction on this Court.

"2. The plaintiffs should sue the defendant at his domicile, in the parish of Carroll.

"3. Upon the demand not yet due, the action is premature, and no writ can issue to sequester the cotton.

"Wherefore the defendant prays that the said action may be dismissed, and the sequestration granted in the same may be quashed, with costs, etc."

The District Court sustained the second ground, as to jurisdiction of the Court and domicile of the defendant, took no notice of the other grounds, and dismissed the suit.

The plaintiff took this appeal.

It is a general rule, that one must be sued before his own judge, who has jurisdiction over the place where he has his domicile or residence. C. P. Art. 162. To the provisions of this article there are many exceptions indicated in Articles 163 and 164 of the Code of Practice, none of which can apply to the case at bar, even by analogy. But it is contended by the plaintiffs and appellants that, as they had a privilege upon the cotton, they could sue the defendant and sequester the cotton in New Orleans, although the defendant had his domicile and residence in the parish of Carroll. There can be no doubt that the defendant could not be cited and decreed, in New Orleans, to pay plaintiff's demand; if so, the question is, could the plaintiff obtain a sequestration of the cotton, when the Court could not give him a judgment for the debt against the defendant *in personam*? The amendment to Articles 274 and 275, Code of Practice, states: "The plaintiff may obtain a sequestration in all cases where he has a lien or privilege on property, upon complying with the requisites provided by law." Revised Statutes, p. 94, § 21.

In the case of *Henning v. Steamer St. Helena*, 5 An. 349, where plaintiff had obtained a provisional seizure of the steamer, asking also a judgment with privilege against the vessel, and a personal judgment against her owner and captain, to pay his services as pilot of the vessel; the suit was brought in, and the defendants resided out of, New Orleans; the pro-



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ceedings *in personam* were dismissed, because of the defendants' domicile. This Court said :

"Undoubtedly, the privilege is an accessory to the principal obligation ; but it does not follow that the remedy *in rem* and the remedy *in personam* are inseparable. The mortgage creditor may seize and sell the land without resorting to the personal liability. So the pledgee may proceed to have the thing pledged judicially sold, without cumulating a prayer for personal judgment. And, in the absence of any prohibition in the Code of Practice, we see nothing unreasonable in disconnecting the enforcement of the privilege from the personal pursuit, when it is impossible to pursue both together. Where there is right, there should be a remedy; it would be a mockery to acknowledge the right, and yet send a creditor to another forum, where the enforcement of the right would be impracticable."

From that decision, it is clear that when a party has privilege on an object, the law and equity give him the right to enforce it, wherever the object may be found. In the case at bar the plaintiffs reside in New Orleans, and the defendant in the parish of Carroll—hundreds of miles from this city; they found the cotton, upon which they claim privilege, in said city; where would have been the cotton, and what would have become of the same, before they could have gone to and returned from the parish of Carroll, with the necessary writ? The answer is suggested by the conduct of the defendant.

Where the execution issues from one parish to another, the courts of the latter may enjoin the writ. 2 A. 323, 492. 4 A. 84. 5 A. 648. This is *lex necessitate*. In this case we see that justice and equity require disconnection of the action *in personam* and *in rem* upon the privilege. We are, therefore, of opinion, that the personal action must be dismissed, and the action *in rem* sustained.

It is therefore ordered and decreed, that the judgment of the District Court be annulled and avoided. It is further ordered and decreed, that the personal action be dismissed and the action *in rem* and sequestration reinstated; that the case be remanded upon the question of privilege and sequestration, to be proceeded in according to law, the costs of appeal to be paid by the defendant and appellee, the costs below to follow the final decision.

No. 882.—W. N. THOMSON et al. v. MRS. S. C. CHICK, Tutrix, et al.

A note signed by a married woman is invalid, where it is not shown that the debt inured to her separate benefit, nor that she was properly authorized. The presumption is that the debt is that of the community.

**A** PPEAL from the District Court, Parish of East Feliciana, Posey, J. W. F. Kernan, for plaintiff and appellant. McVea & Hunter, for defendant and appellee.

HOWELL, J. This suit is brought against the defendant, individually,

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and as tutrix of her minor children, upon a note given by her "for mules for the use of the plantation."

The defense is that when she signed the note she was a married woman, and unauthorized by her husband or the Court to sign it, and that she has no right to bind her minor children.

Judgment was rendered against her, individually, and as of nonsuit in her favor as tutrix.

Plaintiffs appealed, and in her answer defendant asks that the judgment against her be reversed.

The evidence in the record does not sustain the judgment against the defendant.

It is shown that she was a married woman, and it is not shown that the debt inured to her separate benefit or that of her separate property, or that she was authorized by her husband or the Court to contract. The presumption is that the debt was a community debt, until the contrary is shown.

There is no evidence to bind her as tutrix. She did not sign the note as tutrix, nor is there proof of tutorship, or that the contract inured to the special benefit of the minors.

The evidence is insufficient to bind the defendant, individually, or as tutrix.

It is therefore ordered, that the judgment against Mrs. S. C. Chick be reversed, and it is now ordered that plaintiffs' demand be dismissed as of nonsuit, with costs in both courts.

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No. 716.—H. REINERS v. V. St. CERAN.

Payment is a peremptory exception, which may be pleaded at any time before judgment.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*J. J. E. Planchard*, for plaintiff and appellee. *J. P. Hornor*, for defendant and appellant.

**HOWELL, J.** This is an action for the balance of an account for building a steamboat, and furnishing material and labor, to which the general denial was pleaded. After the cause was partially tried, the defendant offered to file the plea of payment, which he was not allowed to do on the ground, as stated in the bill of exceptions, that "every means of defense, such as release, novation, contract or payment by contract, which goes to show the extinguishment of an obligation admitted or proved to have once existed, must be pleaded specially, and cannot be urged under the general issue, which only denies the facts alleged in the petition. The plaintiff might otherwise be taken by surprise."

It need only be remarked that the learned Judge put it out of the power of the defendant to *plead specially*, as he desired to do, and thus conform to the rule of law contained in the bill of exceptions. If the plaintiff was not prepared to meet such a plea, he was entitled to a continuance to obtain evidence. But the Court should have allowed the plea

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to be filed. The grounds of exclusion or refusal, set out in the bill of exceptions, would authorize the filing. It was not too late. Payment is a peremptory exception, which may be pleaded at any time before judgment. C. P. 345, 346. 6 L. 455.

It is therefore ordered that the judgment appealed from be reversed and the case remanded, with instructions to the District Judge to allow defendant's plea of payment to be filed.

No. 1144.—HOMER MARRIONNEAUX v. R. C. DOWNS AND WIFE.

Want of amicable demand, to be available, must be pleaded before issue is joined. Where husband and wife are defendants, citation served on the husband, in order to be binding upon the wife, must be addressed to her as well as to the husband.

**A** PPEAL from the District Court, Parish of Iberville, *Posey, J.*  
*Barrow & Pope*, for plaintiff and appellee. *A. T. Steele*, for defendants and appellants.

HYMAN, C. J. The defendants, Richard C. Downs and his wife, Lavenia J. Downs, appellants from a final judgment rendered against them in favor of plaintiff, have brought up to this Court a transcript of appeal.

This transcript, according to the amended certificate of the clerk of the District Court, does not contain a copy of all the testimony adduced on the trial of the case in the lower Court.

In the transcript there is no statement of facts, bill of exceptions to the opinion of the Judge, or special verdict.

When a transcript is thus brought up to this Court, the Articles 896 and 897 of the Code of Practice require the dismissal of the appeal, unless the appellants, within ten days after it is brought up, file an assignment of the errors of the District Court as to the law, and which errors must appear from the face of the record.

Each of defendants filed their assignment of errors of law, within the time required by the articles of the Code.

Richard C. Downs assigned for error—first, that his exception, pleading therein want of amicable demand, was neither overruled nor set aside, before the final judgment was rendered against him.

This exception should have been pleaded before issue was joined by a judgment by default against him.

After issue was joined this Court did properly in proceeding in the trial of the case, as if no such exception had been filed.

And, secondly, that the final judgment was rendered against him, without a judgment by default having been first taken against him.

The record contradicts that last named ground. A judgment by default was taken against him on the 18th of April, 1866, (and final judgment was rendered against him in May, 1866.)

Lavenia J. Downs, the wife, has, in her assignment, pointed out several errors of law.

It is needless, for the decision of this case, to notice but one, and that is that she was condemned without being legally cited.

She made no appearance in the lower Court.

Service of a citation and a copy of the petition was made on R. C. Downs, her husband, and a single service of citation and a copy of the petition on the husband in a suit against the husband and wife, (where the wife is not separated from bed and board from him by a judgment), is a sufficient service of citation and petition on her. See Code of Practice, Art. 182.

The citation served on Richard C. Downs, was addressed to "R. C. Downs," alone, and the question is whether a citation so addressed and served is a valid service of citation on his wife. Article 178 of same Code says that the clerk of the Court shall make a copy of the petition, and that he must annex to the copy a citation *addressed to the defendant* in the form prescribed in the following article. That article declares that the citation addressed to the defendant must mention the title of the cause, the name of the defendant to whom it is addressed, the place of residence, etc.

It is evident from these articles that the lawmaker required that, to make a citation valid against a defendant, it should be addressed to that defendant. And although service of one citation and a copy of petition on the husband, when both husband and wife are sued together, is a sufficient service of citation on the wife, yet this provision of law does not dispense with the requirement of the law, that the citation should be addressed to the defendant, the wife as well as to the husband, when sued together.

In referring to Article 192 of same Code, we become more confident, in our opinion, that the intention of the law is that citation should be addressed, as well as to the wife as to the husband, when they are sued together; for this article certainly requires that citation should be addressed to the wife when sued alone, although a service of the same on the husband, as in the case when husband and wife are sued together, would be a sufficient service on the wife.

A citation written out and addressed in the form required by law, and the service thereof, together with the copy of petition on the party on whom the law requires service to be made, is the only way in which a defendant can in ordinary proceedings be brought into Court. Proceedings taken against a defendant, (unless they are conservatory acts), before citation in ordinary actions, are null.

It is decreed that the judgment of the District Court against Richard C. Downs be affirmed, with costs of appeal.

It is further decreed, that the judgment of the District Court against Mrs. Richard C. Downs *alias* Lavenia J. Downs, wife of Richard C. Downs, be annulled, avoided and reversed. It is further decreed, that the case be remanded, as to her, to the District Court, to be proceeded with according to law. The plaintiff to pay the costs of appeal caused by her appeal.

## No. 307.—GEORGE H. WILEY v. WOODMAN &amp; BEMENT.

The execution of a judgment cannot be suspended on a rule to show cause. A suspensive appeal will not lie from a judgment dismissing such a rule.

Execution of judgment can only be suspended upon petition, affidavit and bond given for injunction.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J.*  
*Race & Foster*, for plaintiff and appellee. *Emerson & Huntington*, for defendants and appellants.

**LSLEY, J.** A rule was taken in the lower Court by the defendants upon the plaintiff, who had caused execution to issue on a judgment which he had obtained against them, to show cause why proceedings should not be stayed until a hearing could be had upon what the defendants styled their "plea in bar," which they had filed in Court, alleging "the plaintiff to be an alien enemy, residing in the State of Missouri, holding allegiance to the United States of America, and said plaintiff to be an enemy of the Confederate States, and praying for judgment to quash the writ of execution and prohibit further proceedings on the part of the plaintiff."

From the judgment dismissing the plea and maintaining the execution the present appeal was taken.

The proceeding was an anomalous one. A rule to show cause is not the legal remedy to arrest the progress of an execution upon a judgment obtained for a sum of money.

That can only be done upon a petition, affidavit and bond given for injunction. Code of Practice, 304. Amendment of Article 298 C. P. Act 7th April, 1826, § 9.

A suspensive appeal should not have been allowed. 9 An. 302.

The appeal is a frivolous one, and it is a proper case to allow damages, as prayed for. Art. 907 C. P.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with fifty dollars damages for a frivolous appeal, and that appellants pay all the costs of appeal.

HOWELL, J. recused.

## No. 1148.—JOSEPH DUBUC v. WILLIAM VOSS.

The doctrine that the power to remove is incidental to the power to appoint, does not apply to Governors of States. Their power of removal is limited to particular cases, provided for by statutory enactments.

Where two commissions have been issued by the Governor, at different times, to different parties, for the same office, and the one bearing the latter date states on its face that the officer holding the first commission is removed, the presumption is, that he was removed for causes provided for by statute, and the latter commission will supersede the former. The presumption in favor of the proper exercise of power by the the Governor is subject to be overthrown by countervailing evidence.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*A. & M. Voorhies*, for plaintiff and appellee. *E. Filleul*, for defendant and appellant.



TALIAFERRO, J. The parties to this suit contend for the office of inspector of weights and measures for the Second District of New Orleans. They confront each other with commissions for the same office, derived from the same authority. The plaintiff's commission bears date 29th of March, 1866; that of the defendant 16th of November, 1866.

Upon receiving his commission, Voss (the defendant) gave public notice of his appointment. He also demanded from his competitor the public property and the appropriate implements of the office, which were refused. The plaintiff Dubuc took out a writ of injunction against the defendant, restraining him from exercising the duties of his office. When the case was tried in the Court below, judgment was rendered in favor of the plaintiff, perpetuating the injunction, and the defendant has appealed.

There is no need in this case to go far into the inquiry, whether the power to appoint to office implies the power to remove. A mere arbitrary power to remove, depending solely on the will or caprice of the executive, and to be exercised without good cause, the *sic volo, sic jubeo* principle, was surely never accorded by the genius of American institutions. The doctrine of Mr. Madison, in regard to the right of removal by the President of the United States, was founded in considerations of public utility, and proceeded upon the assumption that the power of removal, in the hands of that high functionary, would be exercised with a nice discretion and for right purposes. But, in the progress of time, it has been found that this right is liable to abuse, even by the chief executive officer of the nation, and the last Congress has wisely limited its exercise. That the power to remove is incident to the power to appoint, we are not aware has ever been contended for as appertaining to the governors of States. The character of their functions is not, in all respects, analogous. Their power of removal, we apprehend, is generally limited to particular cases provided for by statutory enactments. It would seem to derogate from the efficiency of the chief executive officer of a State, and to lower the dignity of his office, if the grounds upon which he makes removals should be needlessly subject to the scrutiny of the courts, and liable for slight reasons to be annulled by judicial decrees. But there must somewhere be protection to the honest and faithful incumbent, if, unhappily, his right to hold office should be recklessly violated by the head of the executive department. To the judiciary, in such a case, would attach the delicate and ungrateful duty of inquiring whether the executive had infringed the law. Such cases, we may hope, will be of rare occurrence.

The only evidence before the Court in this case are the two commissions. Both cannot have effect. If the one first issued continues in force, the last is simply null. If the latter is valid, it supersedes the former. The commission to Voss recites that he is appointed in place of "Joseph Dubuc, removed." The act of 1855 (§ 13), relating to the subject of weights and measures, authorizes the governor, in a certain contingency, to remove inspectors of weights and measures. Acts of 1855, p. 362.

The presumption is in favor of every public officer that he performs his duties properly. In the case now before us, the presumption is that the commission last issued is the one legally in force. That presumption is strengthened by the official declaration on its face, that Dubuc was re-

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moved, and by the fact that the governor, by the act of 1855, has, in a certain contingency, the right to remove an inspector of weights and measures. But this presumption, in favor of the proper exercise of power by the governor, was subject to be overthrown by countervailing evidence, if it were in the power of the complainant to produce it. But no such evidence was introduced; and, in its absence, the presumption that the commission of Voss legally supersedes that of Dubuc, must prevail.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further adjudged and decreed, that the plaintiff and appellee pay costs in both courts.

Rehearing refused.

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No. 6963.—D. C. JOHNSTON v. C. YALE, JR., & Co.

The rule of Court, declaring that no private agreement of the parties relative to the progress of any cause shall be alleged unless the evidence thereof shall be in writing, does not apply to agreements which may give rise to another suit.

The waiver of a legal right, to be available, must be clearly and explicitly shown.

**A** PPEAL from the Fifth District Court of New Orleans, *Eggleston, J. Race & Foster*, for plaintiff and appellee. *Emerson & Huntington*, for defendants and appellants.

HOWELL, J. This is a suit for damages based on the violation of an alleged agreement between the parties.

Plaintiff alleges that, finding his business in this city becoming embarrassed by the failure of his former partner to pay his proportion of the partnership debts, he called upon the defendants, who had obtained a judgment against his firm on their note for \$347 25, and entered into an agreement with them to the effect that the latter would not issue execution or proceed against him in any manner, until his return from New York, which place he should have ample time to visit, and obtain an extension of credit from his creditors in said city; that on the faith of said agreement he left for New York on 19th January, 1860; had interviews with his creditors; returned as speedily as possible, arriving here on 15th February following, and found his store seized and closed under a *fiery facias* issued by defendants, since the 4th of the same month, whereupon he paid the said judgment, interest and costs, by reason of all which he sustained damage in the loss of trade, loss of customers, injury to mercantile standing and reputation, and to his mind and feelings, to the amount of ten thousand dollars. Defendants filed a general denial, and after trial judgment was rendered against them by the District Judge for the sum claimed, from which they have appealed.

Defendants objected to parol proof of the alleged agreement as in violation of a rule of Court, prescribing that "no private agreement or consent between the parties or their counsel, relative to the progress of any cause, shall be alleged or suggested by either of them against the other,

unless the evidence thereof shall be in writing, subscribed by the party against whom it shall be alleged or suggested, or by his counsel."

We think this rule applies to the mode of conducting, and the management of a cause before the Court in which it is pending, and not agreements, which may give rise to a cause of action in another suit, and which are subject to other rules of evidence.

The proofs, in our opinion, do not sustain the judgment of the lower Court. Admitting that the agreement of defendants, as alleged, not to issue execution or proceed against plaintiff in any manner, until he could go to New York, get an extension from all his creditors there and return, is satisfactorily proven, the evidence does not afford the data for estimating accurately the damage caused by the acts of defendants, beyond the costs of keeping the property and making the inventory. The opinions of witnesses, engaged in the same business, upon this question, derive weight only from the facts and data upon which they are based being made known; for in no other way can the Court judge of the correctness of their estimate and receive it as proof. This has not been done in this case. The evidence as to the amount of business done in plaintiff's establishment, at the date of the seizure, if of any weight in this respect, shows that there were funds enough on hand to pay defendants' claim and avoid a seizure; but there is no evidence of the profits of which he was deprived or the actual loss in trade, or reputation.

But we do not think plaintiff has shown any such agreement on the part of defendants as precluded them from proceeding as they did under the circumstances. They certainly had the legal right to execute their judgment against him, and any waiver or suspension of that right must be made clearly and explicitly to appear. Plaintiff declares, on their positive agreement not to issue an execution or proceed in any manner against him until he should have ample time to visit New York, and accomplish his purpose of procuring an extension from all his creditors there. From the testimony of his only witness on this point, it is clear that defendants were unwilling to bind themselves positively in advance, and refused to make any written agreement on the subject.

We conclude, from the evidence, that plaintiff was referred to one of defendants' firm, then in New York, and that the member here would not move in the matter until he could hear something from New York through his partner, then there.

It was after the return of this partner, and the lapse of sufficient time to hear from plaintiff, that the seizure was made.

To recover, it was incumbent on plaintiff to make out his case with legal certainty, which he has failed to do. 17 A. 239.

It is therefore ordered, that the judgment appealed from be reversed, and that there be judgment against plaintiff as of nonsuit, with costs in both courts.

## No. 718.—AUGUSTE PINO v. MERCHANTS' MUTUAL INSURANCE COMPANY

Where a policy of insurance contains a condition that the insurance shall not be binding until the actual payment of the premium, the insurers, if they elect to do so, may waive the condition, it being one inserted solely for their benefit; and parol testimony is admissible to prove the waiver. Where an application for insurance is made and accepted, and the policy is made out in duplicate, and the name of the assured, as such, put down on the books of the insurance company, the contract is complete; and, unless the company have required payment of the premium, or given notice that they will not be bound until the premium is paid, there is a waiver of such payment.

Proof of such a waiver is no violation of the rule prohibiting parol evidence to vary or contradict a written contract.

The rule is well settled, in relation to the contract of insurance, that all matters which show the transaction to be void, on the ground of fraud or otherwise, must be specially pleaded.

Evidence of fraud is inadmissible under the general issue.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. C. Dufour, L. Castera and Carleton Hunt*, for plaintiff and appellee. *J. W. Gurley, L. Pierce and A. & M. Voorhies*, for defendants and appellants.

*Brief of C. Hunt and L. Castera, for plaintiff and appellee.*—Auguste Pino has sued the Merchants' Mutual Insurance Company to recover the sum of \$2,086 42, the amount of damage caused him by a fire which occurred at No. 17 Gasquet street, on the 1st of March, 1865. The basis of his claim is a policy of insurance effected with the Merchants' Mutual Insurance Company, against loss by fire, for six thousand five hundred dollars, on household furniture, wines, liquors, provisions, etc.

To this demand the insurance company filed the following answer: "The defendants now come and say that they are not responsible on any policy insuring plaintiff against 'perils by fire,' from the 25th of February, 1865, and ending the 25th of February, 1866, as alleged in his petition; they show that the fire on premises of plaintiff occurred on the morning of the 1st of March instant, and that after said fire, and later in that day, without notice to defendants of said event, the said plaintiff came and paid the premium stipulated by him.

"And now defendants show that, by the second condition in said policy, there was no insurance until the premium was paid, and this he pleads; and further answering, should any further be necessary, they deny the allegations contained in the petition, and pray to be hence dismissed with costs, and for all further relief," etc., etc.

There was judgment in the Court below in favor of the plaintiff, and the defendants appealed.

The testimony adduced on the trial below will be briefly reviewed, so as to place the case properly before the Court. \* \* \* \*

The attempt to refute the allegations made by the plaintiff of his loss is confidently submitted to the Court without further argument. The testimony of all of plaintiff's witnesses is direct, truthful, emphatic and unanimous; that of the two firewardens, on the other hand, consists of merely speculative reasoning, or in the language contained in the admission of Captain Younnes himself, of "conjecture!"

The legal ground on which the defendants rest their objection to the payment of plaintiff's demand—and the only one specially pleaded in

their answer on file—is, that the fire on plaintiff's premises occurred on the morning of the 1st of March instant, and that later in that day, without notice to defendants of said event, the plaintiff paid the premium stipulated by him, and that by the second condition in the policy there was no insurance until the premium was paid.

The non-payment of the premium by the plaintiff until several hours after the fire, is a conceded fact in this case; but it is the universal practice in New Orleans and elsewhere for underwriters to require payment of the premium only long after insurance is effected; and it is always competent for the assured to prove that the insurance company acted according to this established custom, although the policy contain a condition that there is to be no insurance until the premium be paid.

The defendants show, therefore, a misapprehension of correct principles of law, when they oppose the introduction of evidence to establish that it was the custom of their office to effect insurance and deliver policies before the premiums due on them were paid.

In treating of the promise of insurers, and their receipt for the premium, Marshall says:

"The next clause in the policy is that by which the insurers bind themselves to the insured for the true performance of their contract, and confess themselves paid the consideration or premium by the insured, after the rate specified, .....

"The payment or non-payment of the premium, therefore, can have no effect upon the insurance. Every insurer may insist on being paid the premium before he subscribes the policy; but having once subscribed it and given credit for the premium, no matter to whom, he shall not be afterwards at liberty, when a loss has happened, to object the want of consideration for his promise." Marshall on Insurance, vol. 1, book 1, chap. 7, § 3.

And Mr. Phillips, in his work on Insurance, in laying down the law which governs the execution of the contract of insurance, observes:

"Though a policy is a contract between two parties, each of whom is under certain obligations, and entitled to demand of the other a compliance with certain implied and expressed conditions and stipulations, it is subscribed only by the insurer himself, or by his agent or attorney, and when so subscribed and actually or constructively delivered, unconditionally, to the assured, it is a completed and binding contract."

"In the usual form of the policy, the insured on a marine risk acknowledges payment of premium; and, in fire and life policies, of the whole or first annual premium, or deposit or first installments, and accordingly always imports a settlement by cash or premium note, of a part or the whole of the premium simultaneously with the execution and delivery of the policy. This is equivalent to saying, that the contract is not in force until such payment has been made."

"But the rules of an insurance company, or the agreement of the parties, may control the rule just stated, and the policy be binding upon the insurers, though the premium has not been paid or any note given for it, nor the policy actually delivered from the insurance office." Phillips on Insurance, vol. 1, § 4, marg. pag. 22, 23.

And it is expressly declared by Arnould that, in point of fact, "the



premium is never paid, in the actual course of London business, till long after the policy is effected, . . . . .” Arnould on In., vol 1, marg. p. 36.

So likewise, Parsons lays it down, “that the policy which usually states the reception of the premium binds the insurers, although the premium has not been paid, nor a note for it given; and this even if the policy was not delivered from the office, if it was only delayed, and there was evidence otherwise of a completion of the contract. And if the policy provides that there shall be no insurance until the actual payment of the premium, as this provision is inserted for the benefit of the insurer, it may be waived by him or his agent.” Parsons on Maritime Law, vol. 2, p. 28.

And the effect of the acknowledgment of the payment of premium contained in a policy of insurance, is disposed of by Mr. Phillips in these words:

“It does not appear that there is any material distinction between this acknowledgment in a policy of insurance and in other instruments, respecting which the prevailing doctrine is, that the acknowledgment of payment in a deed of conveyance, though it estops the grantor from alleging want of consideration, is only *prima facie* evidence of payment which may be rebutted, . . . . .” Phillips on Insurance, chap. 6, marg. page 515, and numerous authorities there cited.

And again: “An allegation of compliance with a condition is supported by proof that the underwriters waived it.” Phillips on Insurance, § 12, marg. pp. 21, 22.

This rule is also clearly expressed by Parsons, as follows:

“The general rule of law is, that a receipt for money is open to evidence, either to qualify it or controvert it altogether. It is true that, generally, no written contract is to be varied by oral evidence. But even in a deed for land, where the receipt for the consideration money is acknowledged under seal, the actual payment may be inquired into, and any question raised concerning it, which does not tend to impeach or invalidate the deed, or vary any of its provisions; and the same rule must certainly be applied to policies of insurance.” Parsons on Maritime Law, vol. 2, pp. 182, 183.

No other commentary upon these established rules of law and correct pleading will be offered than that furnished by the defendants themselves in the testimony of their witness, L. A. Fourchy, which forms of itself a strong feature of this case. On being first sworn, he said:

“In February and March last I was clerk in the Merchants' Mutual Insurance Company,” and, on being shown the policy of insurance sued on, added, that he recognized his signature to the receipt, on the back thereof.

When recalled by defendants, at a later stage of the trial, and again shown the policy of insurance, he testified “that premium was paid to me on the 1st of March, between half-past ten and nine o'clock, by the plaintiff himself. When he paid the premium on the 1st of March, he, the plaintiff, said nothing at all about a fire having occurred at his place.”

“I delivered the policy to him on that day, without being aware that the fire had occurred. Had I known that this fire had occurred, I would

not have delivered him that policy, except with the consent of the company. I had no authority to make a waiver of the condition of the policy; I did not know at the time I received that premium that the said property was destroyed by fire."

"Plaintiff had applied to the company, through me, to have that property insured; the application was written by the secretary, I think."

"Plaintiff applied at the defendants' office before the 1st of March. Plaintiff's name is down on the books of the company as being insured for the amount of the policy."

"The policy is dated 25th February, because the application was made on that day. I do not recollect that I was much engaged that day. I told the plaintiff nothing about the premium."

"I made the insurance without speaking to Pino; I do not recollect having said to him to call on the following Monday."

When asked what occurred between Pino and himself on that occasion, this witness answered: "I do not recollect; I saw plaintiff in the office. The blanks in the application of plaintiff were filled in the handwriting of the secretary, and I do not know what occurred between him and plaintiff. I know nothing at all of what took place between the plaintiff and myself."

"I might have had a conference with the secretary in relation to plaintiff's application; I cannot recollect whether I did so."

"At the second interview, when I gave him the policy, he paid me the money and I handed him the policy. He said nothing, and I said nothing. I knew that he wanted his policy when he came."

"I do not talk to parties; I have not always time to talk. At the first interview he must have told me he wanted to be insured; but I cannot recollect; these things escape my memory....."

This witness made his appearance once more for the defendants, but with what amount of benefit to their case, the Court will determine. He now swears:

"When I said defendant's (meaning plaintiff's) name is down on our books for the amount of this policy, I meant that that policy is a copy from our records. Of each policy we give out, we keep a duplicate in our records."

"We are not generally paid the premium at the time we deliver the policy....."

There can be no doubt, from these authorities and this testimony, that the contract between the plaintiff and defendants was complete before the fire of the first of March. The defendant could have brought suit to recover the premium under it; and, if this could be done, it is certainly competent for the plaintiff to recover compensation for the loss he has suffered. The contract of insurance is one of indemnity; it is consensual and commutative. After the secretary has written out the application, and the assured, as such, has been put down on their books, the company cannot be permitted to decline to perform faithfully their part under the contract, long since perfected.

These principles of the law of insurance have received a recent exposition in the case of *Goit v. The National Protection Insurance Co.*, decided

in the Supreme Court of New York, the facts of which are most similar to those of the case before the Court.

The action was on a policy of insurance against fire, issued to the plaintiff and his brother, Joseph A. Goit, and assigned by Joseph A. to the plaintiff, after the loss. The premium was not paid until after the loss; the agent of the defendants telling the assured that it was immaterial; that he did not care to receive it until he made his returns, and he would call for it. The premium was paid to, and accepted by, the agent the day after the fire. The defendants, under a provision authorizing it, had directed their agent to cancel the policy; but he had not done so, only mentioning to the assured that he would procure another insurance for them, and that, until he did so, the policy might continue in force. Annexed to the policy was a condition, like the condition in the policy in the case at bar, to wit: that "no insurance should be binding until the actual payment of the premium." In deciding the case, after observing that the premium was not actually paid at the time of the loss, and after observing that this fact was alleged as a reason by the defense for assuming that the policy had not attached, the Court said:

"It is a well-settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made. (Brown's Legal Maxims, 547.) It extends to all provisions, even constitutional and statutory, as well as conventional. The law will not compel a man to insist upon any benefit or advantage secured to him individually. Hence, it was the privilege of the insurers in this case, if they elected so to do, to waive the condition making the actual payment of the premium a condition precedent to the binding efficiency of any insurance, as it was a provision inserted for their benefit, and in which they alone were interested. This waiver may be established by evidence of an express waiver, or by circumstances from which such waiver may be inferred; and it may be by the managers of the company or by a duly authorized agent; and, as it was done by the latter in this case, it was obligatory upon the company." (Barbour's N. Y. Supreme Court Reports, vol. 25, p. 190.

So also the Supreme Court of Maine, in dismissing the case of *Loring v. Proctor*, as one containing matter of fact, proper for the consideration of a jury, held: "that if it was customary for the insured to be content that their policies should, when made out, remain in the office of the underwriter, and still be obligatory; and if it should appear that such had been the case in the office of the defendant, and, at the same time, that the agent or insurance broker had all along declared that the note had been taken, and was upon the company; and if it should be believed that, in case there had been no loss, the premium would have been executed and recovered, a jury might conclude that it was intended that the policy so made out should constitute a binding contract." 13 Shepley's Maine Rep. 58.

And in the case of *Warren v. Ocean Ins. Co.*, where the insured gave no premium note, and took from the company no evidence of the contract, there was judgment, notwithstanding, in favor of the plaintiff. 4 Shepley's Maine Rep. 449.

In the case of *Blanchard v. Waite*, which was decided by the same

Court, one of the plaintiffs (Loring) applied on the 5th of November, 1839, for insurance on the schooner Oxford, and, without signing the premium note, went away. He had, however, signed the proposition book. Afterwards a policy was duly executed and recorded. Four or five days later, Loring called and was informed that the policy was ready. He was then asked to sign the premium note, but declined, saying he had no authority to sign a note for the owners. On the 6th of December, he was again requested to give the note, and again declined. On the 9th of December, the loss of the Oxford became known in Portland, and on the 11th of December—five weeks after the application—Loring tendered the note and called for the policy. But, notwithstanding these mitigating circumstances in favor of the insurers, there was judgment for the plaintiff, and the Court said :

"It appears by the evidence that, in other cases, insurance had been effected with this company in a similar manner ; the applicant having signed the proposition book ; Smith (the president) would then say the insurance is complete, or the vessel is at the risk of the office, and the insured might call when it was convenient and take the policy."

"A contract of insurance is completed when there is an assent to the terms of it by the parties, on a valuable consideration. Neither the giving the premium note nor the reception of the policy by the insured, are prerequisites to its consummation."

And, again: "No copy has been furnished to us of what was signed by Loring, but we understand from what facts are submitted, that he made himself liable for the premium, so that it could have been recovered of him."

"We find then in the case, the terms of insurance reduced to writing, in a book kept by the insurers for that purpose, and signed by one of the insured for the whole, a policy made and recorded, and ready for delivering before the loss: Was the contract at that time completed? Here was a union of minds upon the contract, and the insurers had legal power to enforce the payment of the premium against Loring. *Blanchard v. Waite*, Shepley's Maine, Rep. vol. 15, 58.

On the authority of Mr. Justice Washington, in *Kohne v. Insurance Company of North America*, in the Circuit Court of the United States for Pennsylvania, the doctrine regarding the acts necessary to the complete execution of their contracts of agreement to insure, by underwriters, by their having executed their policy, is carried still further.

In that case the plaintiff's agents, and that of the company, had settled the terms of insurance, but the policy was only filled up some hours afterwards, when the insurance company gave notice thereof to the plaintiff, informing him also that the vessel insured had been captured. Both parties knew nothing of the loss when the policy was executed. When the premium note was offered it was refused by the company, who also declined to deliver up the policy.

The Court, nevertheless, charged the jury that the contract was perfected, and the plaintiff recovered. W. C. C. Rep. 93.

Although the correctness of this ruling of Judge Washington was considered by Mr. Phillips as obscured with some doubt, that doubt has been since removed by the recent decision of the Supreme Court of the

United States in the case of the *Union Mutual Insurance Company v. Commercial Mutual Marine Insurance Company*. The facts found there by the Court, showed that the agent of the plaintiff went to the office of the defendants on the 24th of December, and the president not being in, filled up a blank proposal in the general way. He returned the same day and saw the president, who offered to insure at a given rate. The agent said he would consult his principal, to which the president agreed, and on Monday 26th, receiving a reply accepting, saw the president, who told him that he (the president) assented to the terms, but said that no business was done that day, being celebrated for Christmas, and that the next day he would attend to it. The vessel burnt up that night. The proposal was in the common form with "binding," and a blank for the president's name. This blank had not been filled up by the president, and no premium was paid. Phillips Marg. p. 24.

Judge Curtis, in delivering the opinion of the Court, said:

"The fair inference is, that if the general authority of the president to contract for the corporation had been put in issue, it could have been shown by the most plenary proof that the presidents of insurance companies in the city of Boston are generally held out to the public by those companies as their agents, empowered to receive or assent, either orally or in writing, to proposals for insurance, and to bind their principals by such assent."

"Nor do we deem it essential to the existence of a binding contract to make insurance, that a premium note should have been actually signed and delivered. The promise of the plaintiffs to give a note for the premium was a sufficient consideration for the promise to make a policy. It is admitted that the usage is to deliver the note when the policy is handed to the assured. If the defendant had tendered the policy, we have no doubt an action for not delivering the premium note would have at once lain against the plaintiffs, and we think there was a mutual right on their part, after a tender of the note, to maintain an action for the non-delivery of the policy. In *Taylor v. The Mutual Fire Insurance Company*, (9 How. 320), it was held that a bill in equity for the specific performance of a contract for a policy could be maintained. And it being admitted that in this case the defendants would be liable as for a total loss on the policy if issued in conformity with the contract, no further question remained to be tried, and it was proper to secure the payment of the money, which would have been payable on the policy, if it had been issued." 19 Howard 323.

It is to be observed that this case was carried on appeal from the Circuit Court for the District of Massachusetts, where it was contended that, by force of a State statute, insurance companies could only make valid policies by having them signed by the president and countersigned by the secretary, but the Court were of opinion that the law "only directed the formal mode of signing policies, and had no application to agreements to make insurance."

Indeed, the latest writer of reputation available to us for consultation, Mr. Parsons, who is remarkable for his cautious judgment, and who has reviewed in an enlightened spirit all the cases, does not hesitate to affirm that "there seems to be no reason why the general principle, both of the



common and civil law, that the evidence of a contract need not be in writing, unless expressly required so to be, should not make a parol contract of business valid." 2 Parsons on Maritime Law, vol. 1, page 19, note.

But to discuss the subject longer in this place would involve digression, and it will therefore be pursued no further.

It is true that the Supreme Court of Louisiana held in the case of *Berthoud v. Atlantic Marine and Fire Insurance Company*, that the defendants were not liable where the premium had not been paid, but Judge Eustis, who was the organ of the Court, deemed it undeniable that the reciprocal assent of the two parties to the contract had not been expressed, and was careful to state that the secretary of the company distinctly informed the plaintiff that the policy would not be delivered until the premium was paid. 13 La. 542. It is evident, therefore, that the case was decided altogether on the facts before the Court, and is entirely inapplicable to the case at bar.

But more than enough has been said to establish, conclusively, that the defendants in this case are liable to the plaintiff for the full amount claimed by him, whether their responsibility be considered as settled by the rule laid down in the case of *Goit v. The National Insurance Company*, first referred to, or only as falling within the general principles, and conforming to the recognized tendency of the doctrine of the other authorities cited.

It only remains now to examine the effort made by the defendants to fix upon the plaintiff a breach of warranty. The answer of the defendants set up no such defense, and made no charge of fraud, but only pleaded the general issue, and afterwards set forth the fact that the plaintiff paid his premium after the fire, and without making mention of it.

Formerly, under the plea of the general issue in policies of insurance, the defendants could produce evidence of almost every matter—such as illegality, misrepresentation, change of usage, deviation, breach of warranties, etc., etc., etc. But the new rules of pleading, relating to this subject, provide: "That in every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those also which show the transaction to be void, or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. And by way of instance, again, as far as relates to policies of insurance, the rule specifies, unseaworthiness, misrepresentation, concealment, and deviation, as amongst those matters which must be specially pleaded." Arnould on Insurances, vol. 2, marg. pag. 1287. See also *Kennedy v. N. Y. Life Insurance Company*, 10 An. 811; *Matthews v. Gen. Mutual Ins. Co. of N. Y.*, 9 An. 590; *Kathman v. Ins. Cos.*, 12 An. 38, 39; *Flynn v. Mer. Ins. Co.*, 17 An. 135; and numerous cases there cited, showing that special defenses are necessary, and must be pleaded where it is sought to invalidate the contract of insurance. The Court is also referred to *Michael v. Nashville Ins. Co.*, where the course pursued by the defendants was marked by inconsistency not dissimilar to that shown in this case, and upon which proper comment was made. 10 An. p. 738.

The plaintiff here concludes his case. The determined opposition with which his claim has been met, and the learning and ability displayed by

defendants' counsel, have induced him to review at length the facts on which he relies; to reproduce many quotations from the authorities which sustain him, and to expose the ingenious devices to which the defense has been driven to avoid a just liability from which there can be no escape: at one time attempting to disprove the concurrent testimony of eye-witnesses of the fire, by the conjectures of persons who were not present at it; at another, to show by curious speculations and calculations, that the storeroom burned did not contain the goods which three credible witnesses saw there the night before; at another, that the contract of insurance never attached, because the premium was not paid according to one of the conditions of the policy, or that there was no contract; and, finally, at the same time, that the plaintiff concealed essential particulars which, if known, might have prevented defendants from insuring, or that there was a contract which is voidable, owing to the fact of such concealment.

*Brief of L. Pierce and J. W. Gurley, for defendants and appellants.*—The Court below admits, that if the written contract is to govern, the case is against the plaintiff upon his own authorities; and it then proceeds to relieve him from his embarrassment, by repudiating the document which he had offered as evidence of his contract, and substitutes a verbal agreement, which is nowhere to be found but in the silence of defendants' clerk.

"It is affirmatively shown," says the Court, "by one of their own witnesses, that defendants took the risk on the plaintiff's property without condition." And the Court finds this affirmative proof in the testimony, which it thus quotes: "Mr. Foucher, their clerk, swears that he was the person who effected the insurance; that nothing was said at the time; that he made the insurance without talking to Pino, and he very plausibly accounts for this total absence of any conversation having taken place between him and the plaintiff. He says: 'I don't talk to parties; I have not always time to talk.'" "It is true," proceeds the Court, "the policy sued on contains the clause, that no insurance shall be binding until the actual payment of the premium; but it strikes me that this policy cannot be the true interpretation of what were the conditions under which the parties contracted, in the presence of Mr. Foucher's testimony above referred to; besides, it being shown by this same witness, Foucher, that the policy was not delivered to Pino until after the payment of the premium; and, consequently, after he had experienced the loss, the presumption, in the absence of proof to the contrary is, that Pino had no knowledge of the contents of the policy, and could not have assented to the conditions therein stipulated."

Yet this is the contract upon which Pino, after having retained it in his possession from the 1st to the 28th of March, institutes his suit; and which, without complaint of its terms or conditions, he simply prays, in his petition, the aid of the Court to enforce. Under this state of facts, can it be possible "that the presumption, in the absence of proof to the contrary is, that Pino had no knowledge of the contents of the policy, and could not have assented to the conditions therein stipulated!" We oppose, with confidence, the statements of his petition to the presump-

tions of the Court. Disregarding the policy, the Court could only find evidence of the contract in the statement of Foucher, "that he was the person who effected the insurance." Beside this, there is nought but his silence. How has it, then, determined the amount of the indemnity, the character of the property, its location, the rate of premium, or the term of the policy? Its judgment could not have been shaped without resort to the written contract. Thus arbitrarily adopting or repudiating its stipulations and conditions, the Court in effect declares, that inasmuch as no conversation took place between Pino and the defendants' clerk, when the insurance was effected, it will not receive the written contract as the full and true exposition of the intention of the parties; it will give effect to those clauses which impose liability upon the defendants, and will consider as not written, or assented to, those which make that liability conditional.

In a case not dissimilar in principle, (*Rafel v. Nashville Co.*, 7 A. 245), Slidell, J., says: "The conditions attached to a policy form part of the contract. This has been long settled."

Accepting this as correct law, what is the legal consequence of the non-payment of the premium? The District Judge, after a careful examination of all the authorities, thus states his conclusions in regard to it: "It cannot be questioned, that when a risk is taken with the understanding and agreement that the insurance shall not be binding upon the underwriters until the actual payment of the premium, such an agreement suspends the consummation of the contract, and the payment of the premium is a condition precedent to the contract becoming valid as such." This is in strict accord with all the authorities, and determines the case in favor of the defendants.

In *Berthoud v. In. Co.*, 13 L. 543, to which the plaintiff in his brief has referred, and vainly attempted to explain away—Eustis, J., says: "Supposing that the defendants were bound by the act of the secretary, in marking on the application the rate of insurance, it by no means follows that by that circumstance the contract of insurance was complete. Consent on their part was not given to the contract itself. The consent was given that they would insure at the rate marked, provided the premium was paid. \* \* \* \* Neither the policy nor memorandum were delivered by the defendants, and we can see nothing in what passed between the parties but a proposition which was accepted under a condition which was never complied with by the party, who now wishes to enforce the contract." The case at bar is stronger, in this: That the condition is found in, and forms part of the very contract which the plaintiff unreservedly asks the Court to enforce; and the date of the receipt of premium endorsed thereon furnishes the evidence of his non-compliance with the condition, until after the subject-matter of that contract had ceased to exist. See, also, *Tayloe v. Merchants' Co.*, 9 How. U. S. R. 390; *Beadle v. Chenango Mut. Ins. Co.*, 3 Hill, 161; *Angell on Fire and Life Ins.*, p. 5, § 7, and p. 413, § 399.

If the Court will bear in mind the distinction drawn by Eustis, J., in the decision just quoted, that the defendants never consented to the contract itself, but merely consented to insure at the rate marked, provided the premium was paid, and that the policy in this case contains no

acknowledgment of the receipt of the premium, it will at once perceive the inapplicability of the authorities quoted by the plaintiff.

But it has been argued that the defendants waived this condition by the delivery of the policy. A brief examination of the facts will show that there is no foundation for such an inference. The witnesses all agree that the fire occurred at four o'clock on the morning of the first of March. Some five hours later in the day, and while the defendants were still ignorant that a fire had taken place, Pino, himself, called at their office, and, without informing them of that event, asked for and obtained the policy, and paid the premium. The receipt endorsed on the policy shows that the premium was paid on that day, and the testimony of Foucher fixes the hour. He says that he delivered the policy without being aware that a fire had occurred, and that had he known it he would not have delivered it without the consent of the company. And further, that he had no authority to make a waiver of the condition. His testimony, as to these facts, is not contradicted.

The plaintiff objected to his testifying, as to the hour when the premium was paid, and urged for ground of exception, that "the defendant is estopped by their receipt from alleging that the policy was void, because the receipt or acknowledgment was untrue." Certainly, nothing was further from the intention of the defendants, for it is in the truth of that receipt that they find the strongest cause of nullity. Its date shows that the premium was paid on the very day the property was destroyed. The testimony of Foucher, determining the hour, cannot be said to contradict it. In the absence of this proof, introduced for the purpose of sustaining an express allegation in the answer, the Court would judicially notice the fact, that the incorporated monied institutions of the city are not opened for the transaction of business at four in the morning, the hour of the fire.

Another bill of exceptions was taken to that portion of his testimony, in which he states that had he known of the fire he would not have accepted the premium nor delivered the policy, without the consent of the company. The plaintiff has endeavored to show a waiver by the defendants of the condition, in regard to the pre-payment of the premium, and as if doubtful of his right under his pleadings to do so, he quotes from Phillips: "An allegation of compliance with a condition is supported by proof that the underwriters waived it." If this be a legitimate issue in the case, it would be a hard rule which would allow the plaintiff to support it by proof, and exclude rebutting evidence on part of the defendants.

Surely it is unnecessary to cite authorities to show that a policy obtained under these circumstances is void. Angell, in his admirable work on Fire and Life Insurance, p. 71 § 38, says: "Of course, it would be an objection to the validity of a policy founded upon a previous agreement, that the loss at the time was known to the assured only; but no case has determined that an underwriter, who effects a policy with a full knowledge that a loss has actually happened, may not be bound by it; on the contrary, it has been otherwise determined." And again, on p. 413, § 399: "The risk assumed by the underwriter on the one side, and the premium paid by the assured as the price of that risk are, in the language of Mar-

shall, correlatives, whose mutual operation constitutes the essence of the contract of insurance."

A contract without cause, or subject-matter to rest upon, is null. C. C. 1887, 1891, 1892.

With the same view of establishing a waiver of the condition, the plaintiff has endeavored to show that credit was given him for the premium; and Foucher is the witness relied upon for the purpose. On cross-examination, he states "plaintiff's name is down on the books of the company as being insured for the amount of the policy." But, subsequently, he explained himself, thus: "When I said plaintiff's name is down on our books for the amount of this policy, I meant to say that that policy is a copy from our records. Of each policy we give out, we keep a duplicate in our records." "No credit was given by the company to plaintiff for this premium;" and on cross-examination: "Plaintiff did not apply to me for credit." How can it be urged in the face of this testimony—and there is none other in relation to it—that credit was given to the plaintiff for the amount of his premium. He does not allege it in his petition; he has failed to make proof of the fact, and his conduct in not demanding possession of the policy, until it suited his interest to tender the premium, is conclusive of his own understanding of the contract.

For the like purpose an attempt has been made to show that the defendants are not generally paid the premium at the time they deliver the policy. As the proof looked to a general custom and not to the particular contract sued upon, it is difficult to perceive its bearing. In this case, the policy was not delivered until the payment of the premium. The plaintiff interrogated Mr. Foucher, to prove such a usage; and also, adduced in evidence six receipts, given by the defendants to L. Castera, for premiums paid by him in the years 1854-5-6-7-8, at periods subsequent in date to his policies. To this testimony, and to these receipts, the defendant objected on the ground that they tended to prove a usage, contrary to the express terms and conditions of the written contract sued upon; and that the stipulations and conditions thereof could not legally be contradicted or varied by proof of the existence of any such custom or usage: To these we ask the attention of the Court.

In the case of the schooner Reeside, 2 Sum. Cir. Ct. R. 567, Mr. Justice Story, after stating that the true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intention of the parties, etc., proceeds: "But I apprehend that it never can be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori* not in order to contradict them. An express contract of the parties is always admissible, to supersede or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties."



In this, the plaintiff himself, in his bill of exceptions, thus expresses his concurrence: "That by law it is not permissible to prove anything out of the contents of the policy." And again, "that the insurance company had no right to vary or alter by parol the terms of a policy executed by them. Nor the right to contradict the stipulations of their own policy," etc. Under these authorities, we think the defendants have shown no misapprehension of correct principles of law, in opposing the introduction of such evidence. We submit that the bill is well taken, and that the evidence should be stricken out. But should the court be of opinion that it was properly admitted, then we say there is nothing in the testimony of Foucher, nor in the six receipts of Mr. Castera, to show the character of the policies to which either had reference; and in the absence of proof, the court will presume that the policies were issued in the one case, and the credits given in the other, in conformity to some agreement between the parties, and not in violation of one. It is impossible, successfully, to argue from such proof, in the face of the positive and uncontradicted statements of Foucher to the contrary, the express condition in the policy, and the fact that it was not delivered until the actual payment of the premium, that the defendants consented, in this instance, to assume the risk before the receipt of the consideration.

The errors of this case, and those which have given rise to its only difficulties, are: 1. That the policy itself contains an acknowledgment of the receipt of the premium. 2. That the conditions therein, that the insurance should not be considered as binding "until the actual payment of the premium," has been waived by the defendants. 3. That the contract of insurance was consummated by the consent of the defendants before the destruction of the property.

The correctness of all three are most positively denied by the defendants, and they solicit to their examination the careful attention of the court. As to the first, the policy itself reiterates the consideration of the contract, but makes no acknowledgment of its receipt. The only acknowledgment of payment is that which was endorsed upon it after the loss of the property, as is shown by the date it bears. As to the 2d: The burden of proving a waiver rested upon the plaintiff. He has failed to show it. The record contains affirmative proof that there was none. Foucher positively states that no credit was asked or given for the premium; and Pino, himself, some three hours after the fire, told Mr. Adams "that he was not insured at all." If there had existed an agreement to waive that condition of the contract, Pino must have been a party to it; and, consequently, would have known that he was insured; and when he afterwards went to the office of the defendants, and tendered the premium and demanded his policy, he would not have concealed from them the facts of the loss.

As to the 3d. This error arises from confounding the agreement to insure on conditions, with the contract of insurance itself. They are entirely distinct. The first received the assent of the parties on the 25th February, 1865; and it then became the right of Pino, upon tendering the premium, to demand the execution and delivery of the policy; and of the defendants, upon tendering the policy, to demand, and if necessary, to sue for the premium. In other words, it was the right of either party,

on complying with the conditions, to compel the other to consummate the contract of insurance which they had agreed to make. These were the correlative rights of the parties; they had no others. At any time before the destruction of the property, Pino might have enforced his. At any time before the expiration of the agreed term of one year, the defendants might have enforced theirs. As Pino could not compel the defendants to insure against loss, that which was already lost, so the defendants could not compel him to pay them a risk for a term already elapsed. Hence, it results that the payment of the premium by Pino, after the loss of his property of which fact the insurers were ignorant, cannot avail him. His able counsel have argued, that as the defendants could have brought suit to recover the premium, it is certainly competent for him to recover compensation for his loss. The fallacy of this argument flows from not properly distinguishing between the agreement to insure on conditions, and the contract of insurance itself. If the agreement to insure had been without condition the argument would hold. "In commercial towns, actions on mere agreements to insure \* \* \* are not uncommon. And they are always sustained, whenever it appears that the terms of the agreement have been fully settled by the concurrent assent of the parties, so that nothing remains to be done but to deliver the policy. The contract is executory in the first instance, and completed when the policy is drawn up." Angell on Fire and Life Ins. Co., page 68, § 33.

But the court will bear in mind that this is a suit upon a policy, and not upon an agreement to insure; and by it alone the rights of the parties are to be tested. "The policy," says Duer, vol. 1, p. 71. § 16, "from the time of its execution, with the exception of the cases to be hereafter stated, in which extrinsic proof may be received, constitutes the sole evidence of the agreement of the parties; nor, subject to these exceptions, can any previous letters or communications between them, nor even the written application or agreement be used to vary or control its interpretation."

The authorities relied upon by plaintiff do not sustain him. In *Goit vs. National Pro. Ins. Co.* "The premium was not paid until after the loss, the agent of the defendants telling the assured that it was immaterial, that he did not care to receive it until he made his returns, and he would call for it." It was correctly held that this amounted to a waiver, and was obligatory on the company.

In *Loring vs. Proctor*, 13 Shepley 26, the only question considered was one of jurisdiction. The court declared that inasmuch as questions of fact as well as law were involved, they were without jurisdiction under the statute, and accordingly dismissed the suit without deciding any of the questions submitted.

In *Blanchard v. Waite*, 15 Shepley, 51, the contract was not a conditional one; it was absolute in its terms, and acknowledged the payment of the consideration. There it was in substance decided, that the valuable consideration was the obligation assumed by Loring to furnish a premium note, signed by himself and his co-proprietors. The company resisted payment on the ground that there was no consideration, because Loring had no authority to bind his co-owners. The Court was of opin-

ion that he had, and, consequently, that the contract was in itself complete before the loss. There was an article in the constitution of the company (not in the policy), directory to the secretary, to require payment for all policies of a less sum than twenty dollars, and for all premiums for risks over that sum the "secretary shall be at liberty to take a note," etc. The giving of the note was delayed from time to time, and the delay assented to by the company. Besides, "it appears (say the Court) by the evidence, that in other cases insurance had been effected with this company in a similar manner; the applicant having signed the proposition book, Smith (the president) would then say the insurance is complete, or the vessel is at the risk of the office, and the insured might call when convenient and take the policy."

In *Kohne v. Insurance Co. of North America*, 1 Wash. C. C. R. 93, the first objection made to the recovery was, "that the agreement for insurance was inchoate; and the insurance company having heard of the loss before the policy was delivered, had a right to retract." To this the plaintiff answered, "that the contract was complete, and the policy executed before notice of the loss." Washington, J., charged the jury: "The first objection to this action was not much relied on by the defendant's counsel, and there is certainly nothing in it. There is no charge of unfairness on the part of the agent of the plaintiff, nor is it pretended that he knew of the loss on the 12th, when he waited on the president of the insurance company. \* \* \* The contract, therefore, was not inchoate, but perfected before notice of the capture by either of the parties." In the case at bar, plaintiff knew of the loss when he sought to perfect his contract by the payment of the premium, and the defendants were ignorant of it.

It is said that Mr. Phillips considered the correctness of the judge's ruling in the case as doubtful. The judge himself was not satisfied with the verdict, and subsequently expressed his satisfaction that a new trial had been granted. On the second trial judgment was given in favor of defendants. 1 Wash. C. C. R. 158.

In the next and last case relied on by the plaintiff, that of the *Union Mutual Ins. Co. v. Commercial Mutual Ins. Co.*, 19 How. U. S. R. 322, the agreement to insure was without condition and fully assented to. And it was upon this agreement, as amounting to a present insurance, that suit was instituted. The only question in it, that can possibly be construed as having the remotest bearing upon the case before the Court, was: Whether, under the general principles of the common law, there was any consideration for the contract to rest upon? It was held, that promise to give a note was a sufficient consideration; that the assent of the parties was full and unconditional, and that there remained nothing to be done but to issue the policy, as evidence of that agreement. In the course of their argument, the Court sustained the correctness of the very point contended for by these defendants. They say:

"Whether a risk be commenced when a contract for insurance is made, or only when the policy issues"—(or when the premium is paid?)—"must depend on the terms of the contract. Where, as in the present case, there is an express contract to take the risk from a past day, there is no room or any understanding that it is not to commence until a future day.

Such an understanding would be directly repugnant to the express terms of the contract."

In the case at bar, the contract of which the plaintiff seeks the enforcement contains the express stipulation, that it shall not be binding until the actual payment of the premium.

There are some other authorities referred to by plaintiff, which we will briefly review: The first is from Marshall, to the effect that when insurers (in the policy) "confess themselves paid" the premium—its payment or non-payment has no effect on the insurance—that, having subscribed the policy and given credit for the premium, they are bound by it. This is undoubtedly correct; but in our case no credit was given, and the payment was made when the plaintiff alone knew that he had no property to insure; that he was fastening upon the defendants a dead loss, instead of a risk. Forgetting, for the time, the maxim which he has since ventured to invoke—that the contract of insurance is one of strictest good faith—he aimed, at the expense of a small premium, to secure full indemnity for a loss already incurred.

The next is from Phillips, in which he states that, in the usual form of policy, the insurers acknowledge payment of the premium; that this imports a settlement by cash or premium note, and is (he thinks) equivalent to saying that the contract is not in force until such payment has been made; but he adds: "the agreement of the parties may control the rule just stated." We have controlled it by an express agreement inserted in the policy, that it shall not be binding until the actual payment of the premium; and this clearly imports that no settlement was made.

The next is from Arnould, as to the actual course of London business. With this we have no concern.

The next is from Parsons: that, if the policy "states the reception of the premium," it binds the insurers, though it be not paid, nor the policy delivered, provided there be "evidence otherwise of a completion of the contract. And if the policy provides that there shall be no insurance until the actual payment of the premium, as this provision is inserted for the benefit of the insurer, it may be waived by him or his agent." We admit the correctness of all this; but the defendants have not waived the condition, nor does their policy admit the reception of the premium.

We come now to the consideration of another point, upon which the defendants confidently rely: that the plaintiff has failed to show a compliance with the express warranty of his contract; that the goods insured were "contained in a two-story house, built of bricks and covered with slates." The petition states that the whole of the lost property was "contained in a two-story house, Gasquet street, No. 17, fully described in said policy;" and the above description is taken from it. The answer of the defendants was a general denial; and of this the District Judge says:

"When, in a case of this kind, the plaintiff is met by a plea to the general issue, he is not bound to prove, as condition precedent to his right of recovery, that he has complied with all his warranties, either stipulated or implied." See *Kathman v. General Mutual Ins. Co.*, 12 An. 37.

We contend that this is not the law. The warranty here is an express one, appearing upon the face of the contract; and, in the words of Mr.

Phillips (vol. 2, § 2122), "it must be complied with, and must appear to the Court to be complied with, before the plaintiff has a right to recover." Angell, on Fire and Life Insurance (p. 171, § 142), also says: "A warranty in a policy of insurance, in whatever form created, is a condition or contingency, and unless performed there is no contract. It is styled a condition precedent, which means that it is perfectly immaterial for what purpose the warranty was introduced, and that no contract exists unless the warranty be literally complied with." And again (p. 169, § 140): "Express warranties are stipulations inserted in the policy, on the literal truth or fulfillment of which the validity of the entire contract depends." And Arnould (vol. 2, marg. p. 1326, § 468): "All express warranties being conditions precedent to the policy's attaching, the compliance with them is part of the plaintiff's title, and must accordingly be proved by him in the first instance," etc. And Chancellor Kent, in his Commentaries (vol. 3, marg. p. 288): "Every warranty is part of the contract. \* \* \* It differs from a representation in this respect, that it is in the nature of a condition precedent, and requires a strict and literal performance. \* \* \* A breach of it avoids the contract *ab initio*. Every condition precedent requires a strict performance to entitle a party to his right of action." And Ellis on Fire and Life Insurance (marg. p. 29): "A warranty being in the nature of a condition precedent, it is quite immaterial for what purpose or with what view it is made; but, being once inserted in the policy, it becomes a binding condition on the assured; and unless he can show that it has been strictly fulfilled, he can derive no benefit from his policy."

It is manifest, under these authorities, that, in the absence of an answer, a judgment by default (which, under our practice, is a tacit joining of issue, and equivalent to a general denial) could not have been confirmed, unless the plaintiff had made proof of strict compliance with his warranty; surely the rule cannot be varied by an expressed plea of the same character. The authority cited by the District Judge (*Kathman v. Insurance Co.*, 12 An. 35), as sustaining his view of the law, is the same that was relied upon by the defendants as being most pointedly opposed to it. Its language is too plain to be misunderstood or misinterpreted. In that case, "the plaintiffs, in their petition, allege the seaworthiness of the schooner, and their interest in the merchandise shipped;" and aver that the goods, and the freight money paid in advance, were insured in the defendants' company. "The defendants simply pleaded the general issue." The principal contest was, as to whether, under these pleadings, the interest (and this is no warranty) of the plaintiff in the object of the policy could be questioned. The court by a majority of one, Spofford and Lea dissenting, thought that it could not; but as to the warranties, viz: Seaworthiness and deviation, they were unanimously of the opinion that they were legitimate subjects of investigation. They say: "As regards the questions of seaworthiness and deviation, these are open so far as the testimony which has been offered by the plaintiff tends to establish the one or the other." And they then proceed to comment on the evidence in relation to them. It will be observed that the warranties there were implied ones, while that in the case at bar is an express one, appearing upon the face of the policy. This decision accords with the authorities above



quoted, and is undoubtedly the true rule. Roscoe, in his Treatise on Evidence, ed. of 1832, p. 188, also states it, that under the general issue, defendants may show that plaintiffs are not entitled to recover, on account of non-compliance with a warranty. The authorities cited in plaintiffs' brief are not pertinent to the enquiry. The "new rules of pleading" are those which were adopted by the Court of the King's Bench in England, 1834, for the guidance of the English Courts, and have neither force nor effect here. The absurdity of applying them to our practice is apparent, when we observe that under the very rule which the counsel quotes, the plea of the general issue "operates as a denial of the fact of the subscription of the alleged policy by the defendant." Arnould 2d, page 1286, marg.

In *Kennedy v. N. Y. Life Ins. Co.*, 10 A. 811, there was no question of warranty. The enquiry there was, whether the interest of the plaintiff in the policy could be put at issue without a special plea; and on this the court differed.

The case of *Matthews v. Gen. Mut. Ins. Co.*, 9 A. 590, involved no question of warranty. The issue there was, whether the allegations of the answer were sufficiently explicit to admit proof of fraud. Neither was any such question raised in the case of *Michael v. Nashville Ins. Co.*, 10 A. 738. Their first ground of defence was the non-payment of the premium; and, subsequently, in a supplemental answer, the defendants pleaded misrepresentation and fraudulent concealment. Of these the court said: "The first plea, which was in substance that there was no contract, is inconsistent with the second, which alleges the contract to be void for fraudulent concealment." We find no fault in this decision; but we do not perceive its bearing upon the matter at issue. Time and again was it urged that evidence offered by defendants tended to prove fraud, or fraudulent concealment, and its admission opposed on the ground that no such charge was made in the answer. This objection comes up in the record in plaintiff's bill of exceptions, in these words: "2. That there is no allegation of fraudulent concealment set up in the answer of the defendants, and that such an allegation is necessary to enable defendants to prove fraudulent concealment." The admission of the diagram of the buildings was resisted also, on the ground that it was substantially for the purpose of establishing fraud; "and that fraud had not been set up by the defendants in their answer." And again, the plaintiff, in his brief, interprets the answer as making "no charge of fraud."

No attempt having been made by the plaintiff to prove a compliance with the express warranty of his contract, the defendants offered to show, affirmatively, a non-compliance, and absolute breach of it, in this: that the goods named in the policy were not, at the time of their alleged loss, contained in a "two story house, built of bricks and covered with slates;" but were in a one-story wooden store-room, not covered with slates. To this evidence the plaintiff objected on the ground that it was inadmissible under the pleadings; the court sustained him, and the defendants excepted. The quick objection to the proof is in itself convincing evidence of breach of the condition; but the record furnishes other evidence, and it comes from the plaintiff's own witness. Mrs.

Natrib says: "These goods were in the pantry, *between* the kitchen and the house, immediately *adjoining* the house. "The ceiling of the pantry was not burned down; thinks it is covered with zinc." The defendants gave in evidence a diagram of the premises, to which the plaintiff also excepted, asserting therein "that the best and only admissible evidence under defendants' pleadings, of said premises, is contained in the description of the same in the policy of insurance executed by defendants." Or as it might be stated in other words, the contract which imposed the condition is full proof of its performance. We admit this is a convenience to the plaintiff, but cannot concede it a law to the defendants.

The diagram was admitted. On examining it, the court will see that the pantry designated by letter A, is, as the plaintiff's witness described it, "between the kitchen and the house, immediately adjoining the house." It is clear, then, that the goods were not in the building designated on the diagram as the "two-story brick-slatted house." Defendants were not permitted to prove of what material the kitchen and pantry were built, nor with what covered. The latter, Mrs. Natrib thinks, was roofed with zinc. The floor of the pantry, we are told by the plaintiff's brother, "was about the height of a step from the ground." John Adams, in speaking of it, says: "It is shed built. I mean that the roof is an inclined plane, just on one side." It is in proof that the shelves extended from the floor to the roof, as the diagram which represents them indicates, in the conformity of the upper end, to the slant of the shed. The height from the ground to the roof, as determined by the aggregate space between the shelving, and the statement of Younnes that the space between the top shelf and the roof is three or four feet, is at the most twelve feet and two inches, showing clearly that it was not a two-story building, and thus establishing the fact of a breach of the express warranty. Under the authority of the decision in the case of Kathman, and in its language, this question was certainly "open so far as the testimony which has been offered by the plaintiff tends to establish the one or the other." The law imposed upon the plaintiff the burden of proving a strict and literal compliance. The record furnishes no proof, but of its breach.

TALIAFERRO, J. The plaintiff alleges that defendants insured for him against loss by fire to the extent of six thousand dollars, a stock of wines, liquors, etc., and his household furniture, all of which were stored in a house on Gasquet street; that after this contract of insurance a fire occurred in the house containing the goods insured, by which he suffered loss and damage to the amount of \$2,086 42; that he established this loss by the means and within the time he was required by the policy of insurance, but that defendants refuse to pay the said loss which they insured against. He prayed judgment for the specified sum, with legal interest from the time the same became due.

The defendants, in their answer, plead the general issue. They deny that they are bound to the plaintiff according to the conditions of the policy, and aver that plaintiff, without notice to them, paid the premium after the occurrence of the fire.

The plaintiff had judgment in his favor in the Court below, and the defendants have appealed.

It appears that the plaintiff applied for the insurance on the 25th of February, and that the fire occurred about one o'clock on the morning of the first of March following; that plaintiff went in the course of the same day to the office of the insurance company, and that without saying anything about the fire, of which defendants were ignorant, paid the premium, and got the policy of insurance.

There are only two questions of importance in this case, and they are embodied in two bills of exceptions, taken by defendants to the admission of testimony. These we will consider in their order:

1. The plaintiff declares upon the policy. The policy contains this condition: "No insurance, original or continued, shall be considered as binding until the actual payment of the premium." The plaintiff offered to prove by a clerk in the insurance office that the insurance company are not generally paid the premium at the time the policy is delivered. The defendants objected to the evidence on the ground "that it tended to prove a usage contrary to the express terms and conditions of the written contract sued on; and that the stipulations and conditions thereof cannot legally be contradicted or varied by proof of the existence of any such custom or usage." It may be here noted that plaintiff also offered six different receipts, of various dates, given by the insurance company, showing the payment of premiums to them after the lapse of a month or more, from the time at which the insurance commenced to run. The introduction of these receipts were objected to on the same ground.

The proof of the rule or practice of the insurance company, in this particular, does not vary or contradict the written contract, and we think it was properly admitted. The condition was one which defendants had the right to insist upon, but being a stipulation in their own interest they had a right to waive it. That it was the general usage of the company not to require payment at the time of delivery, the policies might properly be shown to establish only the waiver in most cases of the express condition.

2. The defendants offered to prove a breach of warranty on the part of the plaintiff. That he represented the building he proposed to insure as a two-story brick house, covered with slate, when in fact the house was constructed of wood. The introduction of this testimony was objected to on the ground that the defendants' answer contained only a general denial, and that fraud was not alleged. The objection was sustained by the Court, and the defendants reserved their bill of exceptions.

We think the ruling of the Court correct. Several decisions of this Court have recognized the rule in cases of this kind, that all matters which show the transaction to be void or voidable in point of law on the ground of fraud, or otherwise, shall be pleaded specially. 9 An. 590. 10 An. 811, and 12 An. 38. 17 An., *Flinn v. Merchants' Mutual Insurance Company*.

The prevailing rule seems to be, in regard to policies of insurance, that misrepresentation, concealment, etc., must be specially pleaded. *Arnould on Insurance*, vol. 2, marginal, page 1287.

It is in proof that several days before the occurrence of the fire, the

Pino v. Merchants' Mutual Insurance Company.

plaintiff made application at the office of the defendants for insurance; that the application was filled out by the secretary; that the policy was made out in duplicate, and the plaintiff's name entered on the books as being insured. It is not shown that the plaintiff was required at that time to pay the premium, or that he was informed that the insurance company would not be bound until the money was paid. The proposition to be insured was accepted; a policy made out, and a duplicate kept in the records of the company. The contract was complete, and without any doubt so considered by both parties. No intimation whatever seems to have been given to the plaintiff, that he would form an exception to the company's general usage, to waive a strict compliance with the stipulation in the policy requiring payment of the premium as a condition precedent to its binding force upon the company. There can be no doubt that the insurance company could have compelled payment of the premium in an action against the plaintiff.

We think it clear that the contract was complete on the 25th of February, the date of the policy; and that the delay of the plaintiff until the 1st of March, to pay the premium, and that after the fire had occurred, had no effect upon the obligation of the contract.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Rehearing refused.

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No. 1305.—THOMAS WAINWRIGHT, Administrator, v. MRS. ALICE F. BRIDGES, et als.

ON MR. JUSTICE TALIAFERRO'S OPINION.

The Emancipation Act of the sovereign power necessarily annulled the laws under which contracts relating to the ownership of slaves were previously enforced.

The status or condition of slavery derived its existence from the laws which sanctioned it. The change of the status involved the abrogation of the law which gave it; for emancipation and the existence of law tolerating that condition are incompatible.

Whilst contracts relating to the condition of slavery had the sanction of law, they could be judicially enforced; but the abrogation of the law, giving effect to those contracts, leaves the Courts without authority to enforce them.

The sovereign power, the paramount law, puts an end to the ownership of slaves; but its effect is not limited to that result. It necessarily pervades the entire contract relating to such ownership, and annuls it throughout.

The maxim, *res perit domino*, does not apply where the thing, which is the object of the contract, is not destroyed, but its character only changed by paramount authority.

The prohibition against the enactment of *ex post facto* laws, or laws impairing the obligations of contracts, has no application to the sovereign power.

Slavery seems never to have been established on the continent of America by positive law. Its origin appears rather to have been accidental. In the United States it was simply permitted by the constitution, to continue as it had existed in the colonial state of the country, and clearly without extending to it, even an indirect sanction. The framers of that instrument abolished the African slave-trade after the year 1808, and, looking forward to general emancipation at an early day, left the institution of slavery as they found it.

The province of Louisiana, when transferred to the United States, retained African slavery by the conditions of the transfer, to the extent only that it was tolerated by the Constitution of the United States, and, consequently, it was imbued with that caducity and proneness to extinction which, from the genius and spirit of this government, has characterized the condition of slavery in this country ever since the American revolution.

Freedom, it has been properly held, was a pre-existing right; slavery, a violation of that right. Titles to slaves, would, therefore, seem to be vitiated *ab initio*.

## Wainwright v. Mrs. Bridges, et als.

## ON MR. CHIEF JUSTICE HYMAN'S OPINION, CONCURRING IN THE DECREE.

1. The amendment of the Constitution, emancipating slaves, destroyed, in some instances, liens granted to secure the enforcements of contracts relative to slaves; but the language of the amendment does not show that the sovereign designed and intended the extraordinary deed of *destroying valid contracts*. The amendment only freed the servant from his master, and destroyed liens granted on him. *It did not change or destroy the master's obligations under his contract.*
2. Plaintiff warranted defendant against eviction of the slaves, by any right existing previous to the sale. The right of the sovereign to evict the subject of his property, is not to be disputed. That right existed before the sale of the slaves, and was since enforced. Plaintiff is, therefore, concluded by his warranty. Had there been no warranty in the sale, he would have been entitled to recover.

## ON MR. JUSTICE HOWELL'S OPINION, CONCURRING.

This is not a case in which the thing has perished; but the right of property in all slaves is forbidden by the supreme law and public policy, and no obligation exists. That which is forbidden, is impossible and void. The fact that the contract was made prior to the prohibition; and was then legal, does not relieve it from the effect of the prohibition; and if it be forbidden by public policy and the sovereign will to make a contract, it is equally forbidden to enforce such a contract whenever made.

## ON MR. JUSTICE ILSLEY'S OPINION, (WITH WHOM MR. JUSTICE LABAUVE CONCURRED) DISSENTING.

1. It matters not whether slavery was introduced by express law or otherwise, *if it have the authority of law*, and by our law slaves, *eo nomine*, were classed as things with every other species of corporeal objects. They were *property* in the strictest sense of the term. They were deemed so to be by the Constitution of the United States, up to the time when, by an amendment to that instrument, slavery was abolished. They were introduced into Louisiana as *property*, by the treaty of cession of 1803, and the laws of the United States and of the State of Louisiana *recognised slaves as property*, until the time of the rebellion. Hence, it cannot be controverted, that when the sale by plaintiff to defendant was passed, *it embraced every element of a legal contract*. The question, therefore, is purely one of warranty.
2. Warranty, under our law, in contracts of sale, exists in all cases where the loss of, or eviction from, the thing sold is imputable to the vendor, or to the imperfection of his title, and not where the loss or eviction proceeds from some unforeseen, fortuitous event, beyond the control of the vendor.
3. The title to the slaves transferred by the plaintiff to the defendant was an incontrovertible one, sanctioned by the laws of the United States and of the State of Louisiana. There was no pre-existing right in the sovereign to annul the title for any anterior vice in it. Whatever right the sovereign had in advance to annihilate all title to slaves, proceeded from his will or caprice.
4. The maxim of the Roman law, "*res perit domino*," applies not only to cases where there is an actual perishing of the physical thing or entity, but to those cases also where the *inalterably permanent change in the status* of the object of a sale, destroys and annihilates it as *property*.
5. The abolition of slavery is an *inalterably permanent* withdrawal of that species of property from commerce. Therefore, by the abolition of slavery, slaves have perished as *property*, as completely and to all intents and purposes, as if they had been overcome by death.
6. The act of the sovereign inhibiting slavery was, therefore, a fortuitous event or *vis major*, for which the vendor is not responsible, and the fact that the property sold was an "African slave" does not make the case an exceptional one, so as to exclude it from the rules of warranty applicable to sales of property generally.

**A**PPEAL from the Sixth District Court, Parish of St. Helena, *Ellis, J. T. C. N. Ellis*, for plaintiff and appellee. *Duncan N. Hennen*, for defendants and appellants.

**TALIAFERRO, J.** The plaintiff, as administrator of the estate of Isaac Dykes, deceased, instituted this suit against the defendants as obligors on three several promissory notes, each for the sum of \$895 50, dated December 8th, 1860, payable respectively in twelve, twenty-four and and thirty-six months after date, drawn to the order of plaintiff as administrator, and stipulating interest at the rate of eight per cent. per annum from maturity until final payment.

He specifies several small amounts to be credited on the notes, and prays judgment for the remainder, principal and interest. These notes were executed for the payment of the price of certain slaves purchased by Mrs. Bridges at the probate sale of the succession of Isaac Dykes, deceased, and, as was heretofore the custom, a mortgage was retained upon the slaves to secure the payment of the sum at which they were



purchased. The plaintiff avers the loss of his mortgage right by the emancipation of the slaves, and asks against the defendants a personal judgment.

At the November term of the Court, 1865, the case was assigned for trial at the succeeding April term. In the meanwhile certain parties alleging themselves to be heirs of Isaac Dykes, appeared and prayed to be made parties plaintiffs, averring that they have an interest in the notes sued on, and refer to an act of partition made among the heirs before the parish recorder. The defendants objected to this proceeding, but the Court ordered that due and legal service be made upon the parties as prayed for by the new plaintiffs. The defendants, thereupon, "with reservation of all rights against the proceedings," waived citation and the usual delays, and filed an answer. They reserved a bill of exceptions to the ruling of the Court, and refer to the answer, in which they specially deny the capacity and rights set up by the new plaintiffs, as heirs of Isaac Dykes.

We do not deem it important, in the decision of this case, to pass upon the regularity of the proceedings in the District Court, and omit an examination of the bill of exceptions. Judgment was rendered in the Court below in favor of the administrator, and the defendants have appealed. The defence is, that there is a failure of consideration arising from the emancipation of the slaves by the act of the government; that the warranty expressed in the act of sale, referred to in plaintiff's petition has failed, and that defendants are released from all obligation to pay the notes sued on. On the part of those seeking to enforce obligations of this sort, it is contended that the vendor's warranty does not extend to fortuitous events that happen after the contracts have been entered into; that in regard to such fortuitous events the vendor has nothing to do; that he did not warrant against the acts of the government; and that he cannot be held liable for events, the occurrence of which it cannot be supposed were contemplated by him at the time of the sale. They rely on the maxim, *res perit domino*.

On the other hand, it is contended that it is not consonant with law and equity, after the loss by the act of the government, of the property which was the object of the contract, that the obligor should be required to pay for that property, the right to which would equally have been lost by the obligee had it remained his; that the maxim, *res perit domino* applies only to cases where the thing which was the object of the contract perishes in the ordinary course of nature, or by fortuitous events beyond the control of man, and which are produced by mere physical agency. That in the case of the emancipation of slaves by authority of the government the object of the contract does not perish, but that its status or condition is changed. That the law, making this change of condition, having ceased to secure to the buyer the rights he acquired by the purchase, no longer requires him to comply with his obligation to give the equivalent stipulated for those rights.

This important question has given a wide range for discussion. The subjects of warranty and eviction have been thoroughly examined by counsel, and numerous authorities have been introduced from the Roman and the French jurisprudence. But these tend rather to confuse than to enlighten.

They present conflicting opinions, which it is not easy to reconcile, and from them we are unable to deduce satisfactory conclusions. We must resort then for a solution of the question to the equitable rules that govern contracts in general, and apply them with reference to the effect which the laws abolishing slavery have upon contracts, made in regard to the ownership of slaves.

In entering into the consideration of this subject, we will premise, that in our view of the question, slavery was never, strictly speaking, *established* in this country by positive law. Its original introduction upon the continent of America and the adjacent islands was accidental, arising from the boldness and cupidity of the early European adventurers into South America. Its continuance, when thus introduced, was the result of circumstances, and grew out of considerations of expediency. The system of colonizing in America and the West Indies opened the door for the introduction of slavery, and it was instituted by the greed of speculators and fortune hunters, the government from which they emanated, tolerating the injustice rather than confirming it by positive laws. Its first form on the American continent was that of the Indian slavery in South America, in the fifteenth century.

The Spaniards, soon after their occupation of portions of that country, subjected the Indian tribes around them to servitude, needing labor in the first instance in their mining operations. The savage, from his native state of freedom and his habits of indolence and ease, being plunged suddenly into a condition of abject bondage, sunk under the fatigue and exhaustion of his ceaseless toils. The race began rapidly to disappear. Their miserable fate excited the sympathies of Las Casas, the Spanish philanthropist, who, after strenuous but vain efforts to procure relief for these wretched victims of his countrymen's violation of right, fell upon the singular expedient of substituting African slavery in place of Indian servitude. The scheme was successful, and the African slave-trade was commenced.

African slavery, having this origin and character, in progress of time, reached the province of Louisiana. That province, when transferred to the United States, retained African slavery by the conditions of the transfer, to the extent only that it was tolerated by the constitution of the United States, and, consequently, it was imbued with that caducity and proneness to extinction, which, from the genius and spirit of this government, has characterized the condition of slavery in this country ever since the American revolution. The word slave is not found in the constitution of the United States. Neither is the word slavery. It is a well known fact that the framers of that instrument, in constructing it, purposely avoided the use of either of these words. They expressly terminated at a fixed period the importation of Africans to this country, to be subjected to slavery. It is a matter of history, that at the period of the formation of the constitution, and for years afterwards, the great statesmen of the time had prospective emancipation in view, and never entertained the idea of the perpetuity of slavery. They viewed it as an entailed evil upon the country, which it was their desire to be rid of as soon as that object could be effected by a safe and practicable emancipation. It was reserved for a later if not a wiser school of politicians in

this country, to perceive the blessings of slavery, to discover its divine ordination, and to adopt measures to perpetuate it, pending which, it came to a speedy and final termination. Among the barbarous nations of antiquity, captives in war were subject to death or slavery at the will of the conqueror. This was the prevailing rule. It was acted upon, and recognized among uncivilized men as a right belonging to the victor, and became the basis of slavery among them. This doctrine was asserted by Ariovistus, a king of ancient Germany, in his conference with Julius Cæsar, touching the political condition of certain tribes of Gaul, which the former had subdued. "Ad hæc, Ariovistus, respondit: "Jus esse belli, ut, qui vicissent, iis, quos vicissent, quemadmodum vellent, imperarent: item Populum Romanum victis non ad alterius præscriptum, sed ad suum arbitrium, imperare consuesse." Cæsar's Commentaries De Bellico Gallico, Book 1st, chapter 36. Slavery, under the Roman government, had undoubtedly its origin in this principle, and according to this recognized rule. But five centuries after the days of Ariovistus, when the softening influences of Christianity began to prevail, Justinian conceded that slavery existed in violation of natural right. He said: "Bella etenim orta sunt et captivitates secutæ, et servitutes, quæ sunt naturali jure contrariæ: jure enim naturali omnes homines ab initio, liberi nascebantur. L. I., T. II.

"Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subicitur." L. I., T. III.

In the barbarous ages of the world, when Pagan doctrines and Pagan thought predominated, slavery existed upon the principle that might makes right. Upon the dawning of better days, when civilization and Christianity appeared, the unreasonable dogma failed, and the moral conscience of men no longer permitted them to sustain slavery as a thing of right, and to justify its prolongation, they resorted to the plea of expediency. Such, we infer, has been the unstable foundation of the institution among Christian people ever since the time of Justinian. That it existed in this country without the positive authority or sanction of the paramount organic law of this nation, is indisputable. It was simply permitted at the time of the formation of the government, because it was a peculiar evil that could not, with propriety, be suddenly abated. Its existence was only suspensive, and under the implied understanding that it was to be temporary. The laws, therefore, which existed until recently upon our statute books, on the subject of African slavery, were merely regulations in regard to that relation which existed only by the will of the sovereign power. Shall we, then, announce that the emancipating act of that power is violative of law, and thence deduce the immunity of the seller from loss, and fix it upon the buyer? Shall we say that the seller has been deprived of vested rights by the mere arbitrary will or caprice of that power, when those rights, such as they were, never existed otherwise than by its mere sufferance?

Freedom, it has been properly held, was a preëxisting right; slavery, a violation of that right. Titles to slaves would, therefore, seem to be vitiated *ab initio*.

With these preliminary views of the character of the slavery that lately existed among us, we shall proceed to consider the effects of emancipation

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upon contracts arising from the traffic in slaves. When contracts of that character were entered into they had the sanction of law. They might then be judicially enforced. These conditions were necessary to constitute the sale of a slave a valid contract. Under these conditions the vendor and the vendee contracted; the one that he would pay the price stipulated; the other, that the purchaser should have the labor and services of the slave during his life. The sanction of the law and its authority to enforce both these reciprocal undertakings, being necessary to constitute them a valid contract, it follows that, when these essential requisites to a perfect obligation ceased to exist, the contract ceased also. True, the vendor complied with his part of the agreement by transfer of the title and delivery of the slave; but surely the vendee's consent was given under the assurance that he was to be maintained in the possession of the slave, and to receive his labor and services during life. To force him to a compliance with his part of the contract, would, therefore, be to compel him to fulfil a condition to which he never assented. The sovereign power, the paramount law, puts an end to the ownership. The effect of the act which terminates the owner's right to the slave is not limited merely to that result. It necessarily involves the entire contract, and annuls it throughout. A mortgage of the slave, to secure the payment of the price at which he was purchased, is part of the same transaction. It is a contract made in aid of, and to fulfil an important condition of the contract of sale.

That the mortgage becomes extinct by emancipation is clear. It is evident, then, that the *contract* of mortgage is annulled by the same cause. If an important item in the agreement by which the vendor consented to sell, and without which, perhaps, he would not have sold, is rendered void, does not the annulment of the mortgage make a damaging inroad into the contract of sale? If so, shall we say that emancipation destroyed the contract of mortgage in its entirety, and destroyed the contract of sale only in part? This we think not tenable. The contract by which ownership existed is inevitably demolished, and with it all its surroundings. The prohibition against the enactment of laws impairing the obligations of contracts has no application to the sovereign power. It gives vitality and force to the laws which regulate contracts. But the power and efficacy extended to these laws are granted, and exist only by the will of the sovereign. When, therefore, the sovereign will of this nation declared that African slavery should no longer exist within its borders, an unavoidable result was, that the laws which had theretofore sustained the institution of slavery and given their sanction to and enforced contracts, the objects of which were the sale of slaves, ceased to exist.

We do not consider the position maintainable, that the effect of emancipation was merely to produce a change in the status of the slave, and not to render void contracts relating to slaves. The status of the slave could only be changed by annulling the law that gave him that status. Emancipation, and the existence of laws upholding slavery, are incompatible. They cannot exist together. But it was the law which sanctioned and enforced slave contracts that established the status. Slavery existed in this country by no other law. Is that law now in force? If so, the

former slave-owner may assert his right to the services and labor of the person whom that law once made his slave. If not in force, how can it be invoked to enforce contracts made in relation to slaves? The declaration of emancipation was, in substance, a declaration annulling the laws that sanctioned the dealing in slaves, the enforcement of slave contracts, and, which in fact, created the status of slavery. The fiat of the sovereign is potent to release the contracting parties, as well as potent to set the bondman free. Its sweep is general, and its wisdom does justice to all. With the ownership perished the obligation to pay the price which was the consideration stipulated for that ownership. The buyer is no longer bound to pay the consideration. The seller is no longer bound in warranty. The buyer, the seller, and the bought and sold, are all absolved. The action of the supreme law leaves the courts without power to enforce obligations of the kind sued upon in this case.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed.

It is further ordered and decreed, that judgment be and is hereby rendered in favor of the defendants, releasing them from the obligations sued upon, the plaintiff and appellee paying costs in both courts.

JUSTICES LABAUVE and ILSLEY dissenting.

HYMAN, C. J. Plaintiff sold defendant certain slaves, and now sues him to recover their price.

Plaintiff warranted defendant against eviction of the slaves by any right existing previous to the sale. See Civil Code, 2478.

The right of the sovereign to evict the subject of his property is not to be disputed.

This right existed before the sale of the slaves, and has since been enforced.

Although the amendment of the constitution, emancipating slaves, did, by the effects of its provisions, destroy, in some instances, liens granted to secure the enforcement of contracts relative to slaves, the conclusion is not rational that therefore it destroyed the obligations of the parties to such contracts.

The language of the amendment does not show such intendment, and we are not to disregard its words, to find intention different from the words.

I do not find from the words of the amendment that the sovereign designed and intended the extraordinary deed of destroying *valid contracts*.

The amendment only freed the servant from his master, and destroyed liens granted on him; it did not change or destroy the master's obligations, under his contract.

Plaintiff, in my opinion, would be entitled to recover if there was no warranty in the sale.

Without admitting Judge Taliaferro's premises, I concur in and adopt the decree written by him as the judgment of this Court.



HOWELL, J. Slavery, being the violation of natural right, and sustained only by the constantly operating power of the government, founded upon the popular will, when that power was withdrawn and reversed in its operation, equally by the popular will, all legislation touching slavery became void. Property in slaves being prohibited, all contracts based upon such property are, necessarily, stricken with nullity.

Courts, which act only upon and under the law, cannot give vitality to laws which have become not merely inoperative, but in conflict with constitutional provisions.

To enforce such contracts would be to recognize the consideration as valid.

The Civil Code is a collection of statutory laws, adopted under and deriving authority from the fundamental law, and its rules on the subject of sale relate and apply only to what is property, and cannot be applied to what that fundamental law declares is not and shall not be property.

The right of the people, in their sovereign capacity, to abolish and prohibit slavery, and as a logical as well as legitimate consequence, destroy all legal rights growing out of the institution, is unquestioned and unquestionable. All parties to such contracts are left as they were when such a fundamental change was effected, and stand as if no such property ever existed; all rights, privileges and obligations, growing out of or incident to the ownership of such property, are extinguished. The seller cannot enforce the payment of the price, nor the buyer the obligations of warranty. Each of the parties is equally participant, and consenting in the abolition and prohibition of slavery. One cannot, in equity, retain and exercise his rights, while the other is divested of all rights. The action of the people in their sovereign capacity, is equal, uniform and universal; and, in its effect, is paramount to the ordinary rules regulating private rights.

This is not a case in which the thing has perished, but the right of property in all slaves is forbidden by the supreme law and public policy, and no obligation exists. That which is forbidden is impossible and void. Civil Code 1757, 1885, 1886. The fact that the contract was made prior to the prohibition, and was then legal, does not relieve it from the effect of the prohibition.

If it be forbidden by public policy and the sovereign will, to make a contract, it is equally forbidden to enforce such a contract, whenever made. For these reasons I concur in the conclusions of Mr. Justice Taliaferro, whose views, as expressed by him, command my concurrence.

ILSLEY, J., *dissenting*. I cannot concur with the majority of the Court in their opinion just announced; and, as no question of graver import has ever been presented for solution to any tribunal, I deem it proper to state the reasons which have brought me to a conclusion, differing *toto celo* from the one reached by three of the other judges.

The plaintiff's action against the defendant was to recover the price of slaves, sold with full legal warranty on the 8th day of December, 1860,

and it is resisted by the defendant, whose answer and grounds of defence amount to this :

1. That by the act of the sovereign authority, which is equally binding on the plaintiff and defendant, and for which the said plaintiff is equally responsible with the defendant, the consideration for which the note sued on was given has been destroyed; and that the plaintiff is estopped and restrained from obtaining, and the Court from granting, a judicial remedy to enforce the performance of a contract based upon African slavery.

2. That the said contract, having been entered into on the part of both plaintiff and defendant, with reference to and under guarantees and protection contained in the laws and constitution of the Federal and State Governments upon the subject of African slavery, and those guarantees and protection which entered into the consideration for which the note sued on was given, having been revoked, annulled and abolished by the sovereign authority of the Federal and State Governments, the plaintiff is estopped and restrained from obtaining and the Court from granting, a judicial remedy to enforce the performance of the said contract.

3. That by the acts of the sovereign authority as aforesaid, the judicial remedy can be no longer invoked to enforce the rights acquired by this vendor under the contract sued upon, and that the said plaintiff is estopped and restrained by equity and good conscience from obtaining and the Court from granting, a judicial remedy to enforce the performance of the said contract in favor of the other contracting party only.

4. That by the acts of the sovereign authority as aforesaid, African slavery has ceased to be the subject of conventional obligations and of judicial actions, and it is contrary to equity, to good conscience, to good morals, and public policy, to enforce the performance of obligations, which have no longer the sanction of the laws of the land, and under which the reciprocal rights and responsibilities of parties created by such contracts, can no longer be enforced by judicial authority.

This defence, which takes a wide range, is opposed by the plaintiff, whose theory amounts to this :

1. That his legal right and remedy under the law of his contract, which he stands upon, are in no wise affected by the change in the *status* or *condition* of the slave sold by him.

2. That the clauses in the Federal and State constitutions, inhibiting slavery, had no retroactive bearing or effect whatever upon contracts previously entered into in relation to that species of property, but merely *eo instanti* dissolved the relations between masters and slaves, and terminated the rights of the former.

3. That the emancipation of a slave by the sovereign power is equivalent in law to his perishing by death, as in either event the property, *res*, ceases to exist, and the maxim of the Roman law, *res perit domino*, is as applicable to the one case as to the other.

The loss falls upon the owner who has no recourse in warranty against his vendor.

The questions which arise in this case involve vast interests, and it is therefore not surprising that great talent has been enlisted, and much ingenuity displayed by both parties to sustain their antagonistic theorems.

The defendants' position, in my opinion, embrace the whole subject of inquiry.

1. Did the vendor acquire by the sale of his slaves as soon as it was consummated, any vested legal rights ?

2. Have those rights been legally divested or destroyed, so as to deprive him of his legal remedy to enforce them ?

It is the province of the Courts to solve these queries. The defendants urge that the vendor covenanted with the vendee, under the title which he conveyed to him, to maintain the latter in the peaceable possession of the slaves in perpetuity—a possession without limitation, at least so far as the contract, the *lex contractus* or the *lex temporis* was concerned. The only condition to this warranty of perpetual and peaceable possession being, that the right of the person evicting should have existed before the sale.

The question, as I understand it, is purely one of warranty—for it is not controverted that when the sale of the slaves was made it embraced every element of a legal contract. I shall, therefore, proceed to ascertain whether by the contract of sale or the law which entered into and controlled it—the emancipation of the slaves sold, by the general abolition of slavery, long after the sale, amounted to a loss or eviction which was covered by the general warranty.

Warranty, under our law in contracts of sale, exists in all cases where the loss of, or eviction from, the thing sold is imputable to the vendor or to the imperfection of his title, and not where the loss or eviction proceeds from some unforeseen, fortuitous event beyond the control of the vendor.

Article 3522, § 7, of the Civil Code, defines a fortuitous event to be that which happens by a force which we cannot resist. In cases of redhibition the rule is, "if the thing sold has perished by a fortuitous event before the purchaser has instituted his redhibitory action, the loss must be borne by him. Civil Code, Article 2511. Was the act of the sovereign inhibiting slavery, a fortuitous event or *vis major*; and, if so, does the fact that the property sold was an "*African*" slave, make the case an exceptional one, so as to exclude it from the rule of warranty applicable to the sales of property generally ?

The first of these queries, in my opinion, should be answered affirmatively, the last negatively. It is entirely unnecessary and supererogatory, as I conceive, to enter in the present instance into any elaborate dissertation upon the subject of African slavery, to trace its origin and progress in the United States—for as was said by Mr. Justice McLean, who gave a dissenting opinion in the *Dred Scott* case, and who should therefore be deemed good authority: "It is immaterial whether a system of slavery was introduced by express law, or otherwise, if it have the authority of law." And by our law, slaves *eo nomine*, were classed as things with every other species of corporeal objects. Civil Code, Articles 439, 450, 452, 461, 3422, 3256, § 3.

Slaves were property in the strictest sense of the term. They were deemed so to be by the constitution of the United States, up to the time when, by an amendment to that instrument, slavery was abolished. See the case of *Scott v. Sanford*, 19 Howard, page 411 ; and also by the law of

nations. (See Wheaton's Law of Nations, 724.) They were introduced into Louisiana as property by the treaty of cession of 1803, and the laws of the United States and of the State of Louisiana, recognized slaves as property until the time of the rebellion.

Whether the traffic in slaves was in conflict with natural law, or violated any canon of ethics, is an abstract question which it is unnecessary to discuss. For all the purposes of the present inquiry, it suffices that in every age of the world, from the earliest times, slaves, both male and female, have been bought with money, (Lev. xxv, 1 and 44, 45 and 46; Gen. xvii, 9, 10, 11, 12 and 13,) and have been treated as an ordinary article of merchandise.

In Louisiana, and the other Southern States, "no one" (to use the language of Mr. Chief Justice Taney) "questioned the opinion that slavery and the traffic in slaves was morally right. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute, and men in every grade of society, daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion."

What, in the course of time, would have been the ultimate condition of slaves in Louisiana, is a mere matter of conjecture; but one thing is certain, that but for the rebellion, the day was distant when the change would have been wrought; and, indeed, the change in the status of slaves was, even with that cause, more attributable to policy and expediency than to any consideration of philanthropy or humanity.

The principle that general warranty in contracts of sale, does not contemplate nor extend to losses of, or the evictions from, the thing sold by *force majeure*, which the act of the sovereign, "*Fait du souverain*," is deemed to be, seems to be fully recognized by eminent jurists, and by the tribunals of France, whose laws, like our own, are based upon the Roman civil law. It finds place in the maxim: *Futuros evictionis casus post contractam venditionem ad venditorem non pertinere*. The doctrine receives unqualified support in the following authorities: Cass. 27, plur. un 11, et 20 Mars, 1850; T. 2, 51, dans les motifs. Bordeaux, 23 Janv., 1826; Trop-long, vente T. 4, No. 423; Duvergier, T. 1, No. 35; Marcadé, sur l'article 1826, No. 2, page 253, 5th edition; Zacharia, et ses annotateurs; Massé et Dugué, T. 4, 685, page 295; Texte et note 8; Aubré et Réy d'après Zacharia, T. 3, 355, et la note Rep. Gen. Pal. Fait du Prince, No. 5, 11 suivantes; Meme Rep. et Sup. Verbe Vente 937, 1113; Tarard, faits du souverain; Pothier, No. 935; Domat liv. 1, § 10.

This Court has recognized the same principle in two cases, in one of which, *Ollie v. Ogilvie*, 13 La. 475, the Court deemed a loss, or eviction from such a cause, a *damnum absque injuria*; and in the other case, *Bourg v. Niles*, 6 An. 77, the Court observed, "it is an eviction by the act of the sovereign, and the sovereign alone is to make indemnity where indemnity is due," i. e., to the owner.

The authority referred to by the Court, for its opinion on that point, is the doctrine laid down in Merlin, *Faits du Souverain*, Répertoire, which, after giving a clear exposition of what constitutes the *Fait du Prince*, ou du Souverain, says: "Le fait du Prince est considéré à l'égard des par-

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tieliers, comme un cas fortuit et une force majeure que personne n'en est garant de droit ; la garantie n'en est due que quand elle est expressément stipulée," even if such stipulation, being contrary to public order, would be binding upon the vendor. Journal du Palais, vol. 5, page 147.

A case, however, is referred to by one of the counsel, whose argument in behalf of the defendant's position is very able and ingenious—which he confidently asserts, holds a doctrine very different from that enounced by the authorities I have quoted; but upon a careful examination of that case, I am satisfied that, so far from militating against the doctrine now advanced, it tends to sustain it. It is the case of Furstenstein, C. Bouchepoin, Dalloz, 1830, page 207, Sirey, 1830, [page 285.

The facts presented therein to the Cour Royale d'Orleans, whose judgment to which I shall allude, was affirmed by the Court of Cass. were these:

Jerome, King of Westphalia, had, in his sovereign capacity, granted gratuitously to Count Furstenstein the estate of Immochenhain. On the 11th August, 1809, the grantee sold this property, with full legal warranty "*à toute garantie de droit et de fait*," to Baron Bouchepoin.

In 1813, Jerome having been expelled from his kingdom, the elector of Hesse Cassel, in whose domain the land granted lay, annulled all the gratuitous grants made by Jerome.

To avoid the effect of this ordinance, the Baron Bouchepoin first applied to the Germanic Diet for relief, but in vain, and he was therefore compelled to abandon the premises.

In this state of things, he instituted in the French tribunals an action of warranty against his vendor, the Count Furstenstein, and his action was maintained throughout.

It was contended by the Count, that warranty in sales applies only to evictions imputable to the vendor or to the vices of his title, and not to extraordinary events, which could not have been foreseen, and which the vendor could not control. That the act of the prince, considered as a cause of eviction, should be assimilated to the destruction of a thing by *force majeure*, and could be no more a ground of warranty than would be the destruction of a thing sold, by fire.

The decision in that case was, that there was a preëxisting cause for the eviction—which was, that the grant made by Jerome was in palpable violation of the laws of Hesse.

The warranty was maintained, because the dispositions of the ordinance of the elector of 11th January, 1814, were but the declaration of a preëxisting right ; that, therefore, the eviction—the result of that ordinance, took its source in a preëxisting legislation, and had a cause anterior to the contract of sale; that it could not be considered an act of unqualified sovereignty (*de pleine puissance*) which originated in the *will* or *caprice* of the prince, and that, therefore, it could not be deemed an act of *force majeure*, or overpowering force.

How does that case compare with the one at bar ?

In the Bouchepoin case, there was an inherent vice in Furstenstein's title which he warranted, and which had to yield to a better legal title. Why better ? Because Jerome's gratuitous grant was, when it was made, in violation of the laws of Hesse, and those laws could not be disregarded



by any sovereign; and as the Court, in the language of the opinion, said:

*"La dépossession qui est le résultat de cette ordonnance, prend sa source dans une législation pré-existante, qu'elle a une cause antérieure au contrat de vente, qu'elle ne peut être considérée comme un acte de pleine puissance qui n'a sa source que dans la volonté ou le caprice d'un prince et qu'ainsi elle ne peut être considérée comme un fait de force majeure."*

The title to the slaves transferred by the plaintiff to the defendant was an incontrovertible one, sanctioned by the laws of the United States and of the State of Louisiana.

There was not, as in the case of Bouchepoin, any preëxisting right in the sovereign to annul the title for any anterior vice in it. Whatever right the sovereign had in advance, to annihilate all title to slaves, proceeded from its will or caprice, and this is the great feature and distinguishing characteristic of all the authorities to which I have referred, and which harmonize with the Bouchepoin case, wherein I repeat the warranty was sustained, because Furstenstein's title was inherently vicious, the germ of the vice being that Jerome's grant to him violated preëxisting legislation, and that the act of the elector of Hesse, in annulling it, was not one of sovereign will or caprice.

In a late decision of the Court of Cassation, that august tribunal said:

*"Bien que des terrains vendus par une ville et destinés à former un quartier, n'avaient été achetés que sur la foi de l'établissement de voies publiques devant les traverser d'après les plans annexés, la ville ne saurait être déclarée responsable envers les acquéreurs de la non exécution ou de la suppression de ces voies publiques, par suite de l'expropriation pour cause d'utilité publique du sol sur lequel elles étaient et devaient être établies, cette expropriation constitue un fait de force majeure exclusif de toute garantie."*

The destruction of feudal rights in the Régime Féodal, gave rise to much litigation in France; and analogy is supposed to be found in the decisions of the French tribunals, which sustain the doctrine advanced for the defence in this case, but the resemblance between those cases and this one is very faint, because the abolition of the Droits Féodaux et Censeuls, was accompanied with so many specifications and exceptions in the law itself—that each case, being *sui generis*, no decision in any one case would be authority in another.

One general principle, however, governed the whole jurisprudence on that subject, and it is broadly stated in Cass. 14 Fructidor an 10 Bull., civ. IV. 507, liv. 1, 37: *Que la vente de droits féodaux supprimés postérieurement, est aux risques de l'acquéreur, bien que la chose n'ait pas été livrée ni le prix payé.*

In questions growing out of the abolition of slavery, our attention is naturally directed to the action of the tribunals of our sister States, to ascertain what solution they give to such questions, particularly the momentous one which, for several weeks past, has engaged the earnest consideration of this Court, and in which a decision has just been rendered.

At the July term of 1866, the Supreme Court of Missouri rendered a decision, which states the principle so broadly, that the covenant did not warrant against the action of the State in abolishing the status of slavery,

and that there was no failure in the consideration of the note representing the price, that I deem it advisable to make a copious extract from the opinion of the Court. The Court, after preliminary remarks, said: "The counsel for the appellant assumes that the agreement or undertaking to warrant the title of the girl Clara forever, and that she was a slave for life, amounted to a full covenant, and that she should always continue a slave, and that any act, from whatever source, destroying property in her, constituted such a breach as would make the respondent liable, even on his warranty.

"All warranties, however expressed, are open to such construction from surrounding circumstances, and the general character of the transaction, and the established usages in similar cases, as will make the engagement of warranty conform to the intention and understanding of the parties. 1 Pars. Contr., 576, 5 ed.

"Words of warranty should neither be extended nor contracted in their significance, but should be construed according to their fair and rational meaning. The true rule governing in the construction of covenants of warranty, is undoubtedly to look into, and ascertain the meaning and intention of the parties, if possible, by an examination of the extent of the whole instrument.

"A party may, however bind himself by covenant, where the law would absolve him from liability on the contract, were it not for his express undertaking.

"The question to be decided here, must depend upon the meaning of the parties, after considering the surrounding circumstances. The vendor sold the slave, and covenanted with the vendee that she was a slave for life, and that he would warrant and defend the title to her forever. It is not denied that she was a slave for life, at the time the sale was made, and the covenant entered into.

"The state of slavery was her status at that time, made so by the laws of the land, and there is no pretence that there was anything existing which tended to render the title defective, or to entitle her to freedom. The usual clause inserted in a bill of sale, in the conveyance of that peculiar species of property, was, the person sold was a slave for life; that is, that the person was made a slave by the existing law of the land, and the contract must be presumed to have been entered into with reference to that fact.

"It is the very nature of the institution of slavery, that it can only exist in a civilized nation by the force of positive law. When the vendor sold his slave, with a covenant that she was a slave for life, he intended nothing more than that the law at that time made her a slave for life.

"The covenant extended to all defects in the title, and was intended to protect the purchaser against them. But it cannot be presumed that the sovereign act or authority of the government, by which all title or property in slaves was totally annihilated, was in the contemplation of the parties.

"The emancipation of the slaves by the sovereign act of the people, was neither anticipated nor thought of, when the slave was sold in this case.

"It was not in the minds of the parties, nor embraced within the pur-

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view of the warranty. In case of a sale and conveyance of real estate, when the vendor warrants the title and covenants for peaceable and quiet enjoyment, should the property be swallowed up or destroyed by an earthquake, it will not be contended that such destruction would work a breach of the covenant, rendering the seller responsible. We are unable to distinguish the case supposed, from the one presented here at bar.

"The ordinance of emancipation caused a complete annihilation or destruction of all property in slaves. It could not be controlled by the parties, nor was it contemplated by them; and, clearly, the covenant to warrant and defend the title to the negro, and that she was a slave for life, cannot, by any just construction, be made to apply to such an occurrence." *Philips v. Evans, et als*, Mo. Rep. 38, p. 315. (See also *Lafrance v. Martin*, 17 An. p. 77.)

This reasoning of the Missouri Court is so clear as to bring conviction to the mind, and here I may ask, if warranty is due in such cases as is now, and in the Phillips' case presented, where would be the stopping place for the exercise of this kind of action.

The starting point for prescription would be the date of the eviction, and vendors and warrantors of slaves, however far removed from the last title, would, in contracts for slaves, *executed* as well as *executory*, through a chain of subrogations, be at last overwhelmed in a vortex of vexatious and ruinous litigation.

I consider the abolition of slavery by the sovereign people, as the mere enunciation of one great fact, that the status of slavery was extinct, and that slaves became, on the instant libertini or freedmen.

It had no retroactive bearing whatever on contracts which had been entered into, in relation to that species of property. It was an act of sovereignty, which affected only the owner of slaves, and was in contemplation of law to them, *damnum absque injuria*.

It had no more effect upon contracts for slaves than would have a legislative enactment passed after their date, making some act committed by slaves not *malum in se*, an offence punishable with death or perpetual imprisonment; and it would not be seriously contended that a loss of a slave from such a cause, would be deemed a breach of warranty. If, in such a case, any indemnity was due by the State, the owner would be entitled to it, and it would be paid to him, as was the indemnity by Great Britain and France to the owners of slaves emancipated in their West India colonies.

The rule laid down in Article 1892 of the Civil Code, is, I think, conclusive against the purchaser; it provides: "That where the consideration of, or the cause of the contract really exists at the time of making it, but afterwards fails, it will not affect the contract, if all that was intended by the parties was carried into effect at the time. *The destruction of the property after the sale is perfected, \* \* \* is a case governed by this rule.*"

The maxim of the Roman law, *res perit domino*, so pertinently applied in the Missouri case, is not always to be taken in its strictly literal sense, that there must be a perishing of the *physical thing* or *entity*. The irrevocable change in the status of the object sold, which destroys and annihilates it as *property*, comes upon every consideration of reason and

common sense, clearly within the maxim. The abolition of slavery was not a mere temporary withdrawal of that species of property from commerce, which, at a future period, could, by legislative will, be again ranked as *property*.

A slave, by the abolition of slavery, has perished as *property* as completely, and to all intents and purposes, as if he had been overcome by death.

See Troplong de la Vente, vol. 1, No. 359, p. 476, sur l'article 1624, C. N. et No. 359, p. 477, L. 23 Dig., de seg. juris.

I am satisfied that the right of the plaintiff to recover the price of the slaves sold by him to the defendants, is founded in law, notwithstanding the ingenious and plausible theories submitted to us to sustain the pretensions of the defendants. They soar too high for the judicial mind to contemplate.

The solemn expression of legislative will, cannot be made to yield to every change of circumstances or events, and it is the sacred duty of judicial tribunals to carry out and apply recognized principles of law, upon all occasions and to all cases.

By our system, equity only speaks when the law is silent, (Article 21, Civil Code,) and in the present case the rules of law are, in my opinion, too plain to be misapprehended or misapplied.

I am, therefore, of opinion that the judgment of the District Court should be affirmed.

JUSTICE LABAUVE concurred.

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No. 279.—CITY INSURANCE COMPANY v. STEAMBOAT LIZZIE SIMMONS,  
MASTER AND OWNERS.

The partnership, or community of acquets and gains, is presumed to exist between the husband and wife, when nothing is shown to the contrary, and all property acquired during the marriage belongs to that community of which the husband is the head and master. C. C. 2371, 2374.

The ordinary commercial partnership cannot exist between the husband and wife; nor can the wife bind herself for the debts of her husband contracted before or during the marriage. C. C. 2412.

**A** PPEAL from the Fourth District Court of New Orleans, Price, J.

Singleton & Clark, for plaintiffs and appellees. Hunton & Miller, for defendants and appellants.

LABAUVE, J. The defendants, George H. Kirk and Julia A. Kirk, husband and wife, are sued as owners of steamboat Lizzie Simmons, to be made to pay *in solido*, a note of the following tenor :

"\$518 12.

Cincinnati, June 26, 1860."

"Four months after date, we promise to pay to the City Insurance Co. of Cincinnati, or order, five hundred and eighteen dollars and twelve cents, value received, at the office of Brown, Johnston & Co., New Orleans."

Steamboat Lizzie Simmons,

(Signed)

By GEORGE H. KIRK, Captain."

The District Court rendered judgment in favor of the plaintiffs against the defendants, and the wife alone appealed; and the husband is not before us.

The wife first excepted to the petition on the grounds that plaintiffs have no capacity to stand in judgment, the petition not alleging that plaintiffs are a corporate body.

That said petition discloses no cause of action against respondent, and does not allege that said wife is separated in property from her husband, nor that the debt inured to her separate benefit.

The Court overruled the exception.

We believe that the Court ruled correctly. The note acknowledged the capacity of plaintiffs, who are alleged in the petition to be a corporate body, and to whom the defendants promised to pay. The balance of the exception belonged more properly to the merits.

The wife then filed a general denial of all the facts and allegations set forth in the petition, and she specially denied that she ever derived any advantage from the transaction set forth in the petition.

The only evidence in the case is the note sued upon, together with the protest; therefore there is no proof of separation of property in the record.

We are clearly of opinion that plaintiffs have failed to make out their case against the wife.

The said George H. Kirk, and his wife, are presumed to be in partnership or community of acquests and gains; nothing showing the contrary. C. C. Art. 2369.

The steamer Lizzie Simmons is presumed to belong to that legal community, (C. C. Arts. 2371, 2374, 11 L. 537,) and the husband may dispose of the same. C. C. Art. 2373. The debt sued upon is presumed to be an obligation of the husband, and the wife cannot be made liable to pay the same under the testimony. C. C. Art. 2412. 4 A. 146. 10 A. 30, 303.

But the plaintiffs contend that the wife, not having denied ownership in the steamboat, admitted that she was part owner, and bound as a commercial partner, and they rely for this admission on the case of *Lacoste v. Sellick, et als*, 1 A. 336. That case presents several individuals, who owned a steamer, and it seems to us it cannot apply to husband and wife, who are presumed to be partners in community, as regulated by our laws on that subject, and under which the husband alone is the owner of the boat, and the wife cannot be his commercial partner. *Squire v. Beldon*, 2 L. 269. In that case this Court said: "The community, or legal partnership, is so inconsistent with the ordinary commercial partnership, that both cannot exist together, and the legal supersedes the commercial."

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled and avoided, as regards the defendant and appellant, Mrs. Julia A. Kirk, and that plaintiffs' demand against her be rejected with costs, and that the appellees pay the costs of this appeal.



## No. 914.—JOSEPH H. DELANEY v. ISAAC LEVI.

Defendant, being indebted to plaintiff, gave several orders on different parties for sugar and molasses, as security for the payment of the indebtedness, which, if not redeemed in twenty days, were to become his property: Plaintiff placed the orders in the hands of his agent, with instructions to recover the amount of the indebtedness within the twenty days.

After the expiration of the twenty days, the agent accepts payment on the orders, at different times, in small amounts, with the knowledge and consent of the principal: *Held*—That this is a ratification of the acts of the agent, binding on the principal.

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*Sheldon & Pardee*, for plaintiff and appellee. *Sullivan, Billings & Hughes*, for defendant and appellant.

*Brief of Sheldon & Pardee, for plaintiff and appellee.*—Unless the defence of payment, set up in the answer of defendant is sustained by the testimony, the judgment of the lower Court must be affirmed, for there is no other defence interposed.

The allegation is of payment to the plaintiff himself, but no effort was made to prove this as laid. There is some evidence tending to show payment to one Adolphe Hébert, as agent of the plaintiff. He is the only witness, and was an agent, his powers being stated, and were to this extent: About the middle of May, appellant gave appellee the orders sued upon for sugar and molasses, as security for the payment of the balance due, to wit: \$1,123 65, which orders were delivered to Hébert, with instructions to take the sugar and molasses, unless the balance so found due was fully paid in twenty days.

The sum due Delaney was not paid in twenty days, nor was any part thereof, therefore Hébert had simply the authority to take the sugar and molasses mentioned in the orders, and hold the same for the plaintiff as his property. In advance then, Hébert had no authority to receive payment, except it was made within twenty days, or if not then made, to obtain payment by taking the sugar and molasses. He did neither of these things. But afterwards it seems he did take some current and some uncurrent money, and a watch and chain at a stated value. If this was payment it cannot be from any authority previously given, but must be from a subsequent ratification.

The defendant did not consider this payment unless ratified by Delaney, for he did not take up the orders, but left them in the hands of Hébert. The latter refused to give them up, because he did not consider the matter settled. The receiving of the money, etc., he further considered a deposit, until Delaney would accept it.

Further on, this witness says: "I thought the matter was settled, if Delaney had accepted the money. Delaney at once, and all the time, refused to ratify the settlement."

Where an agent has transcended his authority, persons dealing with him are bound to look to him to find out whether there has been a ratification by the principal or not. Implied or tacit ratification is most frequently found as between principal and agent, and in some cases courts go far in extending the doctrine upon this subject. The principle

is probably correct, although broadly laid down in 7 N. S. 143; 16 L. 51; 18 L. 517; 3 A. 468. In these cases, the controversies were wholly between principals and agents, and the law declared only applies to parties thus related. In conclusion, upon this point, it is submitted that the settlement relied on by the defendant was wholly unauthorized, and has never been ratified, directly or by implication, but on the contrary, has been at all times pointedly disapproved and repudiated.

There is another question. Did the lower Court err in overruling the motion for a new trial? When the application for a new trial is found upon the ground of newly discovered evidence, the affidavit must show that the evidence is material to the suit, and has been discovered since the judgment was rendered, although affiant had used every effort and diligence in his power to procure the necessary testimony. C. P. 561.

The affidavit should show what efforts had been made, that the Court may judge whether proper efforts have been put forth. 3 N. S. 170; 19 L. 475; 18 L. 531.

If it appear that the party has neglected his means of defence, the new trial will be denied. 2 L. 306. 1 R. 92. 9 R. 177. It must be conclusively shown that this evidence could not have been obtained before by the use of due diligence. 18 L. 531. 2 A. 583.

Applications for new trials upon the ground of newly discovered evidence, must be received with great caution. 4 A. 406.

The affidavit must be strictly construed, because the party is presumed to set forth his whole ground, and to have sworn to as much as his conscience would permit. 7 L. 84.

By the common law, new trials are never granted where the newly discovered evidence is cumulative merely. The Courts of this State have gone much further, and hold that the new evidence must be sufficient, if established, to authorize or defeat a recovery. 2 A. 225.

The affidavit is defective, because: 1st. The testimony of Leon Levy would not change the result of the suit. 2d. It does not show what acts of diligence were used. 3d. It does not show that any diligence was used, for the language employed by affiant is, "he has discovered evidence important to said cause, which he could not, with due diligence, have obtained before," or in direct meaning it is this, that if he had used due diligence he could not have obtained the testimony.

The affidavit is loose, defective in many particulars, and is surrounded with many circumstances which excite suspicion of neglect of means of defence. Levi lived in New Orleans; the suit had been pending many months; and Leon Levy is described as living in New Orleans also; it is very singular that so soon after the trial this witness was so fortunately discovered.

*Brief of Sullivan, Billings and Hughes, for defendant and appellant.*—The substance of the testimony is that in October, more than two months after the defendant had made the last payment to Hébert, the plaintiff, having for a long time known of these payments, goes to Hébert and proposes to him to treat the money and property so paid into his hands as collateral security for the payment of the price of goods, which he was about to purchase; and does make two purchases; Hébert, upon his suggestion, and at his

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request, holding what defendant had paid into his hands as collateral security for the goods bought by plaintiff. Now, plaintiff could not make this money and property security for his debts, unless he appropriated it, assented to its being his, and adopted and confirmed the act of Hébert in receiving it in payment. He could only pledge this money and property by treating it as his own, and it could only become his own according to the terms which defendant had, by placing it in Hébert's hands, offered, namely, by making it payment for the alleged balance of the claim. Paley on Agency, 171, note (o.)

"It is evident that there can be no stronger ratification of the act of an agent than the principal's availing himself of the benefit of such act, although unauthorized; and that in like manner a person, by availing himself of the act of one whom he had not originally appointed his agent, must be deemed, retrospectively, to have created the agency from which he derives a profit. In either case, the presumed ratification subjects the principal to the same liabilities to third persons or to the agent, as if the latter had in one case acted within the scope of his powers, or in the other, been a duly constituted agent." See also *Pitts v. Shubert*, 11 La. 288; *Thomas v. Scott*, 3 Rob. 256; *Chesneau's Heirs v. Sadler*, 10 M. (O. S.) 726, 735.

Again: The plaintiff could not separate the payments. His ratification was a confirmation *in toto* of Hébert's acts for him, from which all his verbal protests cannot relieve him, and from which he cannot recede. Story on Agency, 4th ed., p. 315, § 250.

"Another consideration, very important in cases of this sort, is, that the principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole, or none. And hence the general rule is deduced, that where a ratification is established as to a part it operates as a confirmation of the whole of that particular transaction of the agent. It may be added, that a ratification, once deliberately made, upon full knowledge of all the material circumstances, become *eo instanti*, obligatory, and cannot afterwards be revoked or recalled. See also *Elam v. Carruth*, 2 An. 275, and C. C. Arts. 1884 and 1896.

LABAUVE, J. In March, 1863, plaintiff sold defendant twelve bales of cotton for \$3,143. The plaintiff admitting payment in part, claims a balance of \$2,000, with interest, from May 11th, 1863.

The defendant, in his answer, admits that he was indebted to the plaintiff in the sum of \$1,743, and that as security for the payment of the same, he gave to the plaintiff certain orders for sugar and molasses, as set forth in plaintiff's petition. That subsequently to the delivery of said orders, and before the removal of the sugar and molasses, and the commencement of this suit, he paid to plaintiff said sum, and removed said sugar and molasses in his own right.

The District Court, after hearing the testimony, gave judgment for plaintiff for \$1,123 60, with interest from May 11th, 1863. The defendant appealed.

Defendant's counsel have presented to us but one question: "Whether payment was made, is the only question in this case."

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The testimony shows that on the 20th April, 1863, the parties had a settlement, and the defendant owed a balance to plaintiff amounting to \$1,123 65. That about one month thereafter, the defendant was asked to pay; he then gave to the plaintiff as security for said debt, several orders upon planters and others, for sugar and molasses; there were three orders; the defendant was to pay this balance in twenty days, which being done, the orders were to be returned to him; and, if not paid within twenty days, the plaintiff was to take the sugar and molasses mentioned in the orders which were left in the possession of one Adolphe Hébert for safety. This Adolphe Hébert, depositary of said orders, was authorized by plaintiff to receive the money, if paid within the said delay of twenty days. About a month after these orders had been deposited with Hébert, the defendant went to said Hébert's store, and said to him that the plaintiff had offered him (the defendant) \$200 for a gold watch and chain, which he left with Hébert, and also \$125 in bills of Bank of Louisiana. From that time to August 18th, 1863, the defendant paid at different times to Hébert, the said balance due the plaintiff; this payment was made in bank-bills of Bank of New Orleans, Louisiana State Bank, and United States treasury notes and New Orleans city notes.

The defendant, and A. Hébert and Brother, were in account current, and on the 18th August, 1863, they had a settlement, and the balance \$1,123 65, due by defendant to plaintiff, was charged in this settlement in favor of A. Hébert and Brother, against the defendant. It is evident that after the expiration of the twenty days allowed the defendant to pay plaintiff, said Hébert, who had been authorized to receive, had no authority to receive money from the defendant for plaintiff, and the question is whether or not the plaintiff ratified the acts of said Hébert.

It is contended by the defendant that this ratification results from the following testimony of A. Hébert, who states:

"In October, 1863, Mr. Delaney and myself had a talk about trading together, and I said to him I could not sell goods except for cash; his answer was to me: 'You must have money enough in your hands to satisfy what I would like to purchase from you.' I had frequently said to him that I had in my hands money from Levi, the defendant, and when he came this time to buy goods, he said: 'Have you not money from Levi, enough to secure you?' I sold him two different lots, at different dates, to the amount of \$367 73. I made the remark that, besides the selling of goods, he must settle with me for collecting that debt of Levi; he said that is all right, and he would see me justified in the case. I sold the goods in October, to Mr. Delaney at his suggestion, that I had sufficient money in my hands belonging to him collected of Levi, which money was ample security for what he wanted to buy. He then said he had a great notion of taking the \$498 65 in treasury notes and city notes. When I received the money from Levi, I considered it current money, and received it as such \* \* \* \* \*

On cross-examination, he says:

"When I sold him the goods, in reference to the matter of security, I alluded to the whole amount in my hands, the watch and all. I did not specify the watch. At this time bank-bills of New Orleans were at a discount, except Louisiana State Bank, which were worth par. Two or

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three months prior to this, and always, Delaney refused the watch and uncurrent money. In selling Delaney the goods, I trusted him on the Levi claim, and did not limit him to the treasury and city notes. When I told Mr. Delaney that I wanted him to pay me for collecting that debt, I alluded to that part of it paid before April 20th, and had no allusion to the rest of it.

"I thought the matter was settled, if Delaney had accepted of the money. Delaney at once, and all the time, refused to ratify the settlement. He had authorized me to collect the debt of Levi, if paid in twenty days; if not, to get the sugar and molasses. No portion of the debt was paid within twenty days after the orders were given for the sugar and molasses, that is, no portion of the \$1,123 65, balance due May 11th, but a portion was paid a few days after the twenty days had expired. When I received the money from Levi, I considered it more as a deposit than anything; I thought it was for the debt due to Delaney, if he would accept it."

We are of opinion that this testimony establishes a ratification of the payment made by the defendant to A. Hébert. It is evident that the plaintiff obtained goods upon the faith and credit of the money thus paid to, and in the hands of Hébert, who sold him the goods. If he regarded this money as belonging to the defendant, and not to him, he had no right to tell Hébert, in asking goods on credit: "Have you not money from Levi, enough to secure you?" It was upon this suggestion that Hébert sold him goods to the amount of \$367 73. It is evident that he looked upon, and treated the money in the hands of Hébert, as his own money.

It is therefore, ordered adjudged and decreed, that the judgment appealed from be annulled and reversed, and it is further ordered and decreed, that the plaintiff's demand be rejected, and that he pay costs in both courts.

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No. 800.—A. BROWN & Co. v. J. T. McFARLAND.

In a suit on an open account, the defence is the prescription of three years, and the evidence shows an acknowledgment and promise to pay several months after the account became due: *Held*—That this promise works an interruption of prescription from the date of the account to the date of the promise, and it only begins to run again from the date of the promise.

**A** PPEAL from the Third District Court of New Orleans, *Fellows, J.*  
*Geo. L. Bright*, for plaintiffs and appellees. *J. H. Van Dalson*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiffs sue the defendant for \$765 18, with interest from April 8th, 1862, at five per cent. per annum, the value, as they allege, of labor performed for his benefit, in sawing up a lot of timber into staves. This claim is presented in the form of a running account from early in February, 1862, to the 8th of April of the same year. The answer contains a general denial. Defendant pleads in bar of this claim the prescription of three years. Judgment was rendered in the Court below in favor of the plaintiffs, and the defendant has appealed. It is in



proof that defendant, when called on near the end of the year 1862, to pay the account, made no objection to it, but promised to pay it as soon as he got money from a customer for making cisterns. This would seem to bar the prescription of three years, as the last item of the account is dated 8th of April, 1862, and suit was filed 29th of May, 1865, and citation served on the 31st of the same month and year. But the prescription of three years does not apply in the present case. By reference to the account in the record, it is seen that the charges are for certain specific work performed at different periods. There was no continuity in the services supplied. 13 An. 160. 14 An. 653.

It is therefore ordered, adjudged and decreed, that the judgment of the lower Court be affirmed, with costs in both courts.

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No. 829.—MRS. FANNY ASHER v. JOHN FREDENSTEIN—LOUIS E. MARTIN,  
Third Opponent.

Where an intervenor by third opposition asserts in his petition that the sheriff has seized property under a writ of *feri facias*, in the suit in which he intervenes, it is a judicial admission of the judgment and execution.

**A**PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*Roselius & Philips*, for plaintiff and appellee. *J. Hawkins*, for defendant and appellant.

HYMAN, C. J. The plaintiff, Fanny Asher, obtained judgment against the defendant John Fredenstein; had execution issued thereon, caused to be seized under the execution by the sheriff four waggons, as belonging to the defendant, and was proceeding to have them sold by the sheriff to satisfy her judgment, when Louis E. Martin filed his petition, claiming therein to be the owner of the waggons, and obtained a writ of injunction prohibiting the plaintiff and the sheriff from selling them under the execution.

Plaintiff, in her answer to the opposition of Martin, prayed that his opposition and intervention might be dismissed, and that the injunction might be dissolved, with twenty per cent. damages, etc.

On the trial, the District Judge rendered judgment in favor of plaintiff, decreeing that the injunction be dissolved, with twenty per cent. damages.

Martin has appealed from this judgment.

The evidence adduced, does not prove that Martin had either title to or possession of the waggons seized; on the contrary, the evidence satisfies us that the defendant was both owner and possessor of them, when they were seized.

Martin contends that as there was no evidence adduced by the plaintiff of the execution, and the seizure of the waggons under execution, that the judgment of the District Judge was erroneous.

Martin, in his petition, alleged, "that under and by virtue of a writ of *feri facias*, issued in the case of *Mrs. Fanny Asher v. John Fredenstein*,

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the sheriff of the parish of Orleans had seized the waggons, and had advertised them for sale."

This allegation admits that there is both an execution and seizure of the waggons thereunder, and Martin cannot deny this judicial confession, but by proof that he made it through error of fact. See Civil Code 2270.

No evidence has been adduced, showing that Martin was mistaken as to the facts stated in his allegation.

Let the judgment of the District Court be affirmed.

The appellant, Martin, to pay the costs of appeal.

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No. 947.—JOANNA HUCK v. HALLER & BROTHER.

Where the consideration of a promissory note is shown to be Confederate treasury notes, payment will not be enforced by our Courts. The principle is now definitely settled in our jurisprudence, that the issue of Confederate treasury notes was illegal, and all obligations and contracts founded on them are absolutely null and void.

**A**PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*Buchanan & Gilmore*, for plaintiff and appellee. *Emerson & Grow*, for defendant and appellant.

HOWELL, J. This is an action on a promissory note by the payer against the makers, the defence to which is that the note was given for a like sum in Confederate notes, deposited by plaintiff with one of defendants at their store. This defence is fully established by the evidence; but plaintiff's counsel contend that there were two distinct contracts, having different obligations and parties; first, a contract of deposit with one of the firm; second, a note or unconditional promise to pay a sum of money made by the firm in favor of plaintiff, and that the first was executed and merged in the second.

The evidence does not sustain this position; and even if there were the two contracts, as urged, we could not, under our jurisprudence as now definitely settled, enforce the second, because made with a knowledge of the illegal consideration, the knowledge of one partner being the knowledge of the copartners.

It is therefore ordered, that the judgment of the District Court be reversed, and that there be judgment in favor of defendants, with costs in both courts.

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No. 877.—L. BERNARD, CURATOR OF THEOPHILUS THAYER'S SUCCESSION, v. JACHONIAS THAYER.

The jurisdiction of the Second District Court of New Orleans is restricted to probate proceedings. It has exclusive cognizance of suits against a succession, but has no jurisdiction where a succession is plaintiff.

**A**PPEAL from the Second District Court of New Orleans, *Thomas, J.*  
*C. Dufour*, for plaintiff. *J. N. Lea* and *J. Lavergne*, for defendant.

Bernard, Curator, v. Thayer.

ILSLEY, J. On the 15th February, 1861, the defendant, *Jachonias Thayer*, sold with full warranty to one F. Verret, certain lots of ground which a few days after Verret sold without warranty, but with a special subrogation of warranty against his vendor, *Jachonias Thayer*, the defendant, to Theophilus Thayer, who paid the purchase money to Verret.

When *Jachonias* sold the lots to Verret, he had no title whatever to them, having previously on the 25th March, 1857, transferred them to another person, and the present plaintiff deeming the sale to Verret fraudulent and a nullity, instituted the present attachment suit, to recover from the warrantor, *Jachonias Thayer*, the purchase money, by him paid therefore to Verret.

*Jachonias Thayer*, an absentee, represented by a curator *ad hoc*, filed an exception to the jurisdiction of the Second District Court, as being incompetent to take cognizance of the matter complained of in the plaintiff's petition, which exception was overruled by the Court, because, as it held "the action was brought by the representative of a succession, and judgment was rendered in favor of the plaintiff."

This Court has very lately held that the Second District Court of New Orleans is one of limited jurisdiction—which is restricted to probate proceedings only. Act of 1865, sec. 8. Art. 925 C. P.

It can take exclusive cognizance of claims for money, brought *against* and not *for* successions administered by curators, testamentary executors or administrators of successions. C. P. 924, § 13, and 925, *Grubb v. Henderson*, 6 La. 54.

It has no jurisdiction of a suit against the curator of an absentee. *Soulié v. Soulié*, 5 La. 27.

It is therefore ordered, adjudged and decreed, that judgment of the District Court be annulled, avoided and reversed; and it is further ordered, that the plaintiffs' suit be dismissed, at his costs.

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No. 280.—SUCCESSION OF JOHN D. FINK—OPPOSITION TO EXECUTOR'S ACCOUNT.

Where the executor files an account of his administration, and places the attorneys for the estate on the tableau for a certain amount, as the value of their services to the succession during its administration, and other creditors oppose the homologation of the items for attorneys' fees, on the ground that the charges are excessive, and the evidence shows that the attorneys have received large amounts from the succession for professional services prior to the filing of the account, the amounts thus received must be deducted from the amount placed on the tableau to the credit of the attorneys.

**A**PPEAL from the Second District Court of New Orleans, *Morgan, J. J. J. Michel* and *H. D. Ogden*, for appellant. *W. H. Hunt* and *C. Dufour*, for appellees.

TALIAFERRO, J. The executor of John D. Fink, deceased, placed Durant & Hornor on the final tableau of distribution of the succession as creditors for the sum of \$8,935, being the amount of their claim for legal services rendered as attorneys of the succession. An opposition to this claim was

filed by the city of New Orleans, as trustee and agent of the Asylum for Destitute Protestant Widows and Orphans, on the ground that the various charges of the attorneys are excessive, illegal and not due. There were oppositions filed to other claims set down upon the tableau, but the present case involves only the opposition to the claim of Durant & Hornor. The Court below dismissed the opposition to this claim, ordered some amendments in regard to other items, and rendered judgment homologating the tableau as amended, and decreed a distribution of the funds accordingly.

From this judgment the opponent appealed.

It appears that long involved and intricate law suits grew out of the settlement of the succession. Two or three strenuous efforts were made to annul the will. These attacks, by much labor and legal ability of the counsel on the part of the succession, were successfully repelled. The interests involved were large and important, and witnesses attest the assiduity and skill with which they were protected. The amount placed upon the final tableau of the executor in round numbers at \$8,935, as the attorneys' fees, is made up of various items stated elsewhere in the record in an account, though not so explicitly as would be desirable. In this account there is one item of \$5,000, specified as "services in *Pellenz v. Bullerdieck* to break the will, and also in *Fink et al. v. Executor*, to break the will both in Second District Court and Supreme Court."

It seems that, upon a provisional tableau previously presented to the Court and approved, the attorneys of the estate had been allowed \$5,700 for "services to date." There is some obscurity, in regard to what these services were, and as to the time when they were rendered; but it appears sufficiently clear that the \$5,700 were received after the will cases had been carried through the District Court, and before they were disposed of by the Supreme Court. The evidence of several distinguished gentlemen of the bar was taken in regard to the value of the services. They seemed to concur in the opinion that if the amount received was intended as compensation for services in the more important case, in both Courts, the subsequent charge of \$5,000 for the other two cases would be excessive and unreasonable. If the sum paid was only for conducting the defence in the principal litigation in the District Court, one should be inclined to think the fee ample, and the additional charge for ulterior services in the Supreme Court too large. Upon the whole, guided by the opinions of the witnesses as far as they were given upon the somewhat indefinite state of facts, and upon a review of the account, we are inclined to reject the item of \$5,000.

Another item of the account specified as "services in advice and consultation with the executor, from filing tableau No. 1, up to 30th May, 1860, touching the business of the estate during the last four years, at \$250 per annum, making \$1,000," we consider vague and unsustained by the evidence. This item should, in our opinion, be likewise disallowed. With these deductions the account is reduced to \$2,935.

It is therefore ordered, adjudged and decreed, that the judgment of the lower Court be annulled, so far as it rejects the opposition of the city of New Orleans; that that opposition be sustained as to the item of \$5,000; and also, as to the item of \$1,000, which items constitute part of the attor-

neys' account, and part of the aggregate sum of \$8,935, objected to by the said opponent.

It is further ordered, that the tableau be amended accordingly, and that the judgment in all other respects be affirmed—the costs to be defrayed by the succession.

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No. 741.—EDWARD SCHINKEL *v.* HERMANN HANEWINKEL.

Where one of a series of notes, secured by mortgage, delivered by the maker, has come again into his hands, the debt evidenced by it is extinguished by confusion. C. C. 2214.

By reissuing such note, after maturity, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing it, which being only an accessory to the principal debt between the maker and the payee, is extinguished with the note. C. C. 3232, 3374.

**A**PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. C. Dufour*, for plaintiff and appellee. *E. J. Wenck* and *C. Roselius*, for defendant and appellant.

LABAUVE, J. On the 4th May, 1863, the defendant, Hermann Hanewinkel, executed three promissory notes to his own order, and endorsed by him; one for \$5,000, another for \$3,000, and a third one for \$2,000, and to secure the payment of the same, executed a mortgage on certain city lots. The plaintiff having become the holder of the first named note for \$5,000, and of the third named note for \$2,000, obtained an order of seizure and sale, and had the mortgage property sold for cash, and the proceeds of sale amounting to \$3,500, were retained by the purchaser after paying costs and charges.

Plaintiff's counsel took a rule upon Webber, who was the holder of the \$3,000 note, to show cause why the whole proceeds of sale should not be applied to the payment of the two notes sued upon, on the ground that the said \$3,000 note had been returned to the maker, and was extinguished.

Webber answered to the rule that the said note had been given to him as a collateral security by one Marchand, to secure the sum of about \$1,800, and prayed that the rule be dismissed.

The testimony shows that this \$3,000 note had been in the hands of Edward Schinkel, and handed back by him to the maker, Hanewinkel, who it seems gave it to one Marchand, a note-broker, who passed it to George Merz to obtain money for the maker, Hanewinkel. George Merz was paid for the note by Marchand at its maturity. Marchand says:

"I became the owner of this note at its maturity on my paying it. Hanewinkel came to me, and, upon hearing his troubles, I offered him this note, and Webber got it from him. This occurred a couple of months after the note had been paid by me at maturity."

It appears then that this note had come in the hands of the maker, who reissued it to Webber two months after maturity. Webber acquired, knowingly, an extinguished paper, and the mortgage was also extinguished, and could not be revived. C. C. Arts. 3374, 2214; 4 Rob. 416, *Hill v. Hall*.



Schinkel v. Hanewinkel.

We are of opinion that our learned brother decided correctly, in making the rule absolute.

It is therefore ordered and decreed, that the judgment appealed from, be affirmed with costs.

No. 350.—THE MAYOR AND COUNCIL OF CITY OF CARROLLTON *v.* J. M. MAGEE.—THE SAME *v.* D. M. HOLLINGSWORTH.—THE SAME *v.* MRS. N. SETTOON.

Where the certificate of the clerk of the District Court does not show that the record contains all the evidence adduced, and the record contains no statement of facts, no exception to the opinion of the Judge, nor special verdict, and the appellant has not filed in the appellate Court an assignment of errors of law apparent on the face of the record, the case cannot be examined on its merits, and the appeal will be dismissed.

**A** PPEAL from the Second District Court, Parish of Jefferson, *Burthe, J. C. Roselius and R. L. Preston*, for plaintiff and appellant. *M. M. Reynolds*, for defendants and appellees.

LABAUVE, J. These three cases are all contained in one single transcript, forming but one record and one appeal, and the certificate of the clerk of the inferior Court, appended to said record, states and certifies:

"That the foregoing forty pages contain a full and complete transcript of the documents therein contained, offered and on file in the matter of *City of Carrollton v. J. M. Magee, D. M. Hollingsworth and Mrs. Settoon*, Nos. 1830, 1831 and 1832 of the docket of this Court."

This certificate does not show that the record contains all the evidence adduced, and the record contains no statement of facts, no exception to the opinion of the Judge, nor special verdict, and the appellant has not filed in this Court an assignment of error of law apparent on the face of the record.

We cannot examine the case on its merits, and we must dismiss the appeal. C. P. Art. 897. 6 L. 144, 157, 209. 1 R. 460. 4 R. 147.

The appeal is dismissed, at the costs of the appellant.

No. 586.—BRIDGEFORD & Co. *v.* COLTON & BALDWIN and J. S. SIMMONDS.

Where plaintiff alleges that he drew a draft on defendants for the value of goods sold them, which they accepted, and the draft is annexed to and made a part of the petition, but is not offered in evidence on the trial, nor does the evidence in the record show a sale and delivery of the goods, the suit will be dismissed as of nonsuit.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. A. Saucier*, for plaintiffs and appellees. *B. Egan*, for defendants and appellants.

TALIAFERRO, J. The plaintiffs, residents of Louisville, Kentucky, allege that about the 1st of February, 1861, they sold and delivered to Col-

ton & Baldwin, of New Orleans, goods, wares and merchandise of the value of four hundred and thirty-nine dollars and thirty cents. They aver that at the time the goods were furnished, J. S. Simmonds, one of the defendants, was in fact a copartner in the firm of Colton & Baldwin, or the sole owner of the stock of goods then in the store of Colton & Baldwin; that the pretended sale and transfer, some time previous of Simmonds' interest in the firm of Colton & Baldwin, was a fraud and simulation; that the goods sold by plaintiffs to Colton & Baldwin inured to the use and benefit of Simmonds. The defendants filed separate answers, containing a general denial. Judgment was rendered against the defendants *in solido*, and Simmonds alone has appealed.

The petition recites that plaintiffs drew a draft on Colton & Baldwin for the amount or value of the goods sold them, which they accepted, and that the draft is annexed to and made a part of the petition. We do not find such a draft copied in the record, nor do we find evidence of any kind, showing a sale and delivery of goods by plaintiffs to the defendants. From the transcript before us, it is clear that the plaintiffs have failed to make out their case.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered, that this case be dismissed as of nonsuit.

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No. 925.—JOHN J. ADAMS & Co. v. STEAMER TRENT AND OWNERS.

The shipper of two bales of cotton transferred the bill of lading to plaintiff after the cotton had been discharged and delivered to the shipper: *Held*—That the plaintiff cannot recover from the owner of the boat.

**A**PPEAL from the Fourth District Court of New Orleans, *Théard, J.* Miles and Thomas Taylor, for plaintiffs and appellants. Clarke & Bayne, for defendants and appellees.

*Brief of Clarke & Bayne, for defendants and appellees.*—This is a suit for the value of two bales of cotton, alleged to have been shipped on the steamer Trent; that bill of lading was transferred to plaintiffs after arrival of the steamer and cotton at New Orleans, and that the cotton was not delivered to the transferees of the bill of lading.

The evidence shows that William Dunn, who shipped two bales of cotton, accompanied them on the steamer Trent; that the cotton was consigned to his order, and was received by him in New Orleans; that being pressed by plaintiffs to pay a debt of about four hundred dollars due to them, he delivered to them the bill of lading after the cotton had been discharged and delivered to him. The question presented is simply one of fact, and this has been decided in favor of the plaintiffs by the District Judge, who heard and saw the witnesses.

This is a desperate effort to save a bad debt, and the evidence shows that plaintiffs are trying to cast on the defendants a loss already sustained by them. The defendants had complied with their obligation, by deliv-

Adams &amp; Co. v. Steamer Trent and Owners.

ering the cotton on the levee, and pointing it out to Dunn, who accompanied it to New Orleans, and who had consigned it to his own order. *Northern v. Williams*, 6 An. Rep. 579. *Gauche v. Stone*, 14 An. Rep. 412.

HYMAN, C. J. This suit is for the value of two bales of cotton, shipped by William Dunn on the steamboat Trent.

The bill of lading given for the cotton to Dunn was transferred by him to plaintiffs, after he, as the evidence shows, had received the cotton from the boat.

The judgment of the District Court was in favor of the defendants, and the plaintiffs are appellants from the judgment.

Let the judgment be affirmed, at appellants' cost.

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No. 919.—JAMES W. FEE v. JAMES GONEGAL.

Plaintiff brought suit for the price of salt purchased by defendant in 1862; defendant pleads that the salt was for the Confederacy, and that Courts of justice should not enforce the contract. There being a doubt of plaintiff's knowledge of the unlawful purpose of defendant, the Court will presume him to be innocent.

The defendant cannot take advantage of his own unlawful acts to annul his contract.

**A**PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
C. B. Singleton, for plaintiff and appellee. *Sullivan, Billings & Hughes*, for defendant and appellant.

LABAUVE, J. This suit is brought to recover \$1,755 50, a balance of the price of 250 sacks of salt, alleged to have been bought from plaintiff by defendant through B. F. Smith, about 26th May, 1862, at the rate of \$8 per sack.

The only defence in this Court, and none other has been urged by the defendant, is, that the contract of sale was for an unlawful purpose, which was participated in by the plaintiff, and that for its enforcement the plaintiff cannot invoke the aid of the Courts; and upon this the defendant rests his case as established upon the merits.

The case turns entirely on a question of fact, which is this: Is it clearly proved and shown that the plaintiff knew that this salt was going into the Confederacy, as called by the witness?

B. F. Smith, who bought the salt for the defendant, states:

"When he says he told Mr. Fee, that he was taking this salt over the lake, he cannot tell whether he said '*Confederacy*,' or '*over the lake*;' but the usual expression then, was '*over the lake*'. What was meant by '*over the lake*?' Did this expression mean Confederacy, or any other place out of the Confederacy? We know that the lake communicates with the gulf, which was in possession of the United States. We must give the plaintiff the benefit of the doubt, and presume that he did not intend to violate the laws of his country, unless a clear case be made out against him. So far as shown by the evidence, he is presumed to be innocent. It is not so with the defendant, who, through his able and

learned counsel, has boldly urged and proved his own turpitude, and attempted to bring in the plaintiff as participating in his violation of the law, in order to avoid the payment of a just debt, and to enrich himself at the expense of the plaintiff.

We are of opinion that the plaintiff has made out his case, and that the defendant has failed to establish his defence, by showing that plaintiff was *particeps criminis* in the illegality of the transaction. The District Court decided correctly in favor of plaintiff.

The judgment of the District Court is affirmed, with costs.

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No. 964.—JOSEPH H. HARVEY AND WIFE *v.* JONATHAN POTTER.

The proprietor of a tract of land has a right to excavate within his own boundaries a canal, for the purposes of navigation, and to require payment for its use from those who choose to avail themselves of its facilities.

If works, beneficial to the public, are constructed by private enterprise upon private property, and the public choose to avail themselves of the benefits of such works, equity would require compensation to be made for the benefits conferred.

Persons availing themselves of such privileges form an implied contract to remunerate the owners of the property, and it is immaterial under what term or expression such remuneration is claimed.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. A. Saucier*, for plaintiffs and appellees. *Roselius & Philips*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiffs sue for "tolls and charges," which they aver defendant owes them for the use of a canal, constructed upon their own land, and kept in order at their own expense. The answer is a general denial, with the special averment that plaintiffs have no right to exact such charges. The plaintiffs had judgment in the Court below, and the defendant has appealed.

It seems that the plaintiffs, owning a body of land in the parish of Jefferson, right bank, extending from the Mississippi river five or six miles back to the Bayou Barrataria, have enlarged and much improved a canal constructed originally by the late Mr. Destretien, father of Mrs. Harvey, one of the plaintiffs. That this canal affords navigation for boats of considerable size, and that great facilities are offered by it for transporting from the interior, wood, lumber, fish, and other commodities destined for the New Orleans market.

The defendant, it is shown, has for a considerable length of time, availed himself of the use of this canal, in boating wood and lumber to market.

The plaintiffs have fully established the facts they have alleged, and the only question presented is: Has the proprietor of a tract of land the right to excavate, entirely within his own boundaries, and exclusively at his own expense, a canal for the purposes of navigation, and to require payment for its use by all who choose to avail themselves of its facilities? It is not easy to perceive how, in such a case, the public become seized of the right to the gratuitous use of advantages afforded by individual labor

and enterprise. The right of expropriation, it is true, belongs to the public, and the land and canal so constructed upon it, might, under constitutional and legal provisions, become public property, and be appropriated to public use. But where no public need exists for such conversion, and the property in its entirety is subjected to private ownership, it would seem that the proprietor has the right, in any manner he deems best, to render that property most productive, subject only to the rule *sic utere tuo ut alienum non ledas*. We are unable to see that the means used by an owner, to increase the value of his property, makes any difference in regard to his right to avail himself of the profits arising from the lawful exercise of such means. If he constructs works useful for the public upon his private property, and the public think proper to enjoy the benefits of these works, equity would certainly require that for the benefit received, compensation should be returned. Private property shall not be taken for public uses, without ample remuneration first made to the owner. This is a fundamental principle. So it would seem clearly to follow that private property cannot be used by the public without compensation for that use. Suppose the plaintiffs, in this case, should refuse to permit the defendant to use their canal, would an action of damages lie against the owner? If not, it must appear that the defendant is not entitled to require the use of the canal free of charge, as he would have to require the free use of a navigable stream, or a public road. But the defendant bases his refusal to pay the charges demanded by plaintiffs, on the ground that these charges are presented in the shape of tolls, or rather that the plaintiffs call them tolls. The plaintiffs, in their petition, use the terms "tolls and charges." The objection is, that no one can exact the payment of a toll unless he had been vested with a franchise by an act of the legislature, which enables him to do so. This objection would be valid, if applied to the pretensions of a person who, without such franchise, should demand toll on a public highway. But it does not appear that the canal in question has in any manner been constituted a public highway. We are referred by the defendant to the case of *Boykin & Lang v. W. A. Shaffer*, 13 An. p. 129. In that case there was some color of right, under a franchise. The legislature had conferred, upon a navigation company certain privileges, and the company made a contract with Shaffer to do a part of the work, for which it granted to him the privilege of building locks, to improve the navigation of a bayou, and the right to demand toll for the use of the locks. The question seemed to turn upon the right of the company to delegate the privilege to require toll, and the Court, under all the circumstances shown, but with some hesitation, recognized the right. But it was shown that the bayou, although much obstructed by drifts, was, at some stages of water, to some extent navigable in small boats. The facts in that case differ widely from those in the case now before the Court. In the case referred to in 13th Annual, the bayou was indirectly considered a public highway.

We concur with the Judge of the District Court, that the plaintiffs' claim arises from an implied contract, on the part of the defendant, to compensate the plaintiffs for the use of their property. We also consider it unimportant what term or expression was used by the plaintiffs to denote the remuneration claimed for that use. They made no pretension



to a franchise, or to be authorized by law to exact payment under the legal sense of "toll."

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

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No. 778.—PERROUX v. LACOSTE.

By refusing an order of seizure and sale, because the mortgage note was prescribed, the Judge would supply the plea of prescription.

Prescription is a means of extinguishing a debt, but can only be applied when specially pleaded.

The questions of prescription, and of interruption of prescription, cannot be considered on an application for an order of seizure and sale. The debtor is amply protected by Art. 730 C. P.

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*L. Castera*, for plaintiff and appellee. *E. Bermudez*, for defendant and appellant.

**HOWELL, J.** On the rehearing of this cause, the plaintiff and appellee contends that the action of the Court, in requiring authentic evidence of the interruption of prescription to sustain the executory process, is supplying the plea of prescription, and, consequently, a direct violation of Art. 3426 C. C.

He insists that a compliance with the provisions of Arts. 732, 733, 734 and 735, C. P., is all that the Judge can require of him, and that if the debt be prescribed the debtor is protected by Arts. 739, No. 8, and 740 C. P., which enables him to arrest the sale upon his oath and without surety; that the only question for the Judge is, whether sufficient evidence is presented to authorize the writ, and that the evidence adduced by him (an authentic act importing a confession of judgment, with the note duly *paraphed*) was and is sufficient, unless some fact has made it insufficient, which fact the Court cannot of its own motion suggest; that the Court must disregard and consider not written any endorsement of a credit or extension on the note which may be shown to be an interruption of prescription, a matter *en pays*, and in defence only. He also urges that an examination of the authorities will show that the jurisprudence on this point is not too firmly established to be questioned.

The question arises, is the requiring of authentic evidence of the interruption of prescription, before granting the order, *supplying* the plea of prescription? If so, it is prohibited, and the Judge is not warranted in refusing the writ, for the want of such evidence.

If there were nothing on the note (apparently prescribed), showing an *interruption* of its prescription, could the Judge refuse the order of seizure? Would not such action be supplying the plea of prescription, and calling upon the plaintiff, on behalf of the defendant, to defeat it? We are constrained to answer the first query in the negative, and the second in the affirmative. "Prescription is a *means* of extinguishing a debt, but it is only when specially pleaded it can have that effect. Courts are not allowed to consider it an *extinction* of a claim, no matter what the evi-

dence may be, unless the plea is expressly put in." 3 L. 204. C. C. 3426, 3427.

It is true that in an application, *ex parte*, for the writ of seizure and sale, the debtor has no opportunity of putting in the plea; but he is protected by Art. 739, C. P., and if his debt is extinguished, or extinguishable, he can easily establish the fact. The law says to the Judge, where a creditor presents an act of mortgage in authentic form, in which the debtor acknowledges the debt for which he gives the mortgage, accompanied by the note properly identified, the creditor is entitled to the executory process; and it says further, that the Judge shall not supply the plea of prescription; shall not presume the debt extinguished; there is authentic evidence of the debt and mortgage, which is complete, until the debtor chooses to invoke the provision of law which annuls or paralyzes the whole evidence. It is not the incompleteness or insufficiency of the evidence that relieves the debtor on the question of prescription, but that it causes to be evidence against him—an effect which the Court cannot permit, until petitioned to do so.

The argument that the remedy and not the right is denied, might have force, were it not for the express prohibition in Art. 3426 of the Civil Code, in connection with the articles of the Code of Practice, regulating the executory process.

We cannot perceive that any endorsements of extension or partial payments on the notes can make any difference in the character of the evidence requisite for the process. The act of mortgage remains authentic; the identity of the note continues, and taken together they constitute full proof of the debt, until prescription is specially pleaded, where the creditor must establish *aliunde* the writ of the endorsements. If the plea is not made, it is unnecessary to prove them, and they may be considered surplusage, or rather, not considered at all. The fact of interruption is important only where prescription is pleaded, and as the Court cannot raise the plea, no evidence of interruption can be required by the Court, until the plea is made by a party authorized to make it.

The first case in which this point was raised, is that of *The Union Bank v. Dosson et al*, 7 A. 550, which was an appeal from the refusal of the Judge to grant a writ of seizure and sale, the refusal being based on the want of reinscription of the mortgage within ten years. Prescription, however, was specially pleaded in the Supreme Court, and the action of the Judge *a quo* was sustained, because there was no authentic evidence of the interruption. We think the doctrine was there too broadly stated, and not necessary in such terms; that is, "as the obligation is *prima facie* prescribed, there must be authentic evidence of the interruption of the prescription, *before* the party can proceed by the *via executiva*." In this case prescription has not been pleaded. The objection is raised only in the brief.

The only other case cited, or which we can find, is that of *Fowler v. Beatty*, 10 A. 275, in which the point does not appear to have been raised, and the reference to the doctrine may well be considered *obiter dictum*. In neither case is allusion made to Art. 3426, C. C., and we must think that for a court to consider an obligation *prima facie* prescribed, is to supply

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the plea of prescription. *Non constat*, that the debtor would make the plea.

The interruption is no part of plaintiff's evidence, and need not be noticed, because prescription cannot be presumed.

In this view we do not abate the principle that, in proceedings *via executiva*, being of great severity, the creditor must bring himself strictly within the letter of the law.

We conclude that the Court cannot require authentic evidence of the interruption of prescription, before granting an order of seizure and sale, because the law prohibits it; and, at the same time, provides the debtor with ample protection against a prescribed debt. Any other conclusion would, in our opinion, render the eighth clause of the 739th Article of the Code of Practice, and the 3426 Article of the Civil Code, nugatory.

As to the want of the internal revenue stamp, we must presume that the Judge acted according to law, and we take this opportunity to state that, in the case of *McLearn v. Skelton*, 18 A. 514, cited by appellant, the note was *by consent of both parties* brought into this Court, to prove the want of the stamp; a fact which we omitted to state in our opinion in that case.

It is therefore ordered, that the judgment heretofore rendered by us be set aside, and it is now decreed that the judgment of the lower Court be affirmed, with costs.

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No. 987.—JOHN RIST v. A. L. ABBOTT.

The matter of continuances for the most part addresses itself to the sound, legal discretion of the District Court, to be judged of according to the circumstances presented.

**A**PPEAL from the Third District Court of New Orleans, *Fellows, J. John McKee*, for plaintiff and appellee. *Race, Foster & E. T. Merrick*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiff sues the defendant on a promissory note for \$2,000, dated November 30, 1859, and made payable to the defendant's own order forty months after date, with interest, at eight per cent. per annum from date, payable at the Citizens' Bank, in New Orleans. A credit of six hundred dollars was entered on the note for a payment of that amount on the 2d November, 1865. The payment of the note is secured by mortgage on land, in the parish of Natchitoches.

The only defence is that set up by exception to the prematurity of the action, on the ground that the plaintiff specially agreed with the defendant to extend the time of payment twelve months, from November, 1865, on condition that defendant payed at the time the extension was agreed upon, the sum of six hundred dollars. The defendant avers that he paid the six hundred dollars as stipulated, and that the plaintiff, in violation of the agreement, has instituted this suit. Upon affidavit made

Rist v. Abbott.

by defendant, he obtained a continuance, or delay of thirty-five days, to take the testimony under commission of a witness residing in the city of New York. The delay expired without the testimony of the witness being obtained. On the 14th of April, 1866, (the order for a commission to issue, having been issued on the 23d February preceding), the exception was overruled, and the defendant filed an answer containing, in substance, only the matter set up in the exception. When the exception was called up for trial, the defendant moved the Court to continue the case a day or two, to await the return of his attorney, then absent from the parish, in order that he might make affidavit of the use of proper diligence, without effect to procure the testimony desired, within the delay granted, and thereby be enabled to apply to the Court for further time to get the evidence. This was refused, and to the refusal the defendant reserved a bill of exceptions, which is embodied in the record. The matter of continuances, for the most part, addresses itself to the sound legal discretion of the Court, to be judged of according to the circumstances presented. The Judge of the lower Court saw no sufficient reasons for a continuance, and we incline to agree with him in that opinion. We do not think this case a proper one in which to award damages for a frivolous appeal.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

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N. 926.—W. W. WASHBURN v. R. H. OFFUT.

A party to a contract, the consideration of which is Confederate treasury notes, cannot recover thereon.

**A**PPEAL from the Third District Court of New Orleans, *Fellowes, J. L. E. Simonds and Race, Foster & E. T. Merrick*, for plaintiff. *Elmore & King*, for defendant.

LABAUVE, J. This suit is brought upon a draft of the following tenor :  
 “\$2,940. Montgomery, May 30th, 1862,”

“At sight, pay to the order of W. W. Washburn, twenty-nine hundred and forty dollars, for value received, and charge to the account of  
 To Samuel Snodgrass,  
 New Orleans.”

The defence is, among others, that the consideration of the bill of exchange, sued upon, was Confederate treasury notes, the unlawful issues of rebels in arms against the United States.

The District Court gave judgment for defendant, and the plaintiff appealed.

The testimony establishes clearly, that the consideration of the bill sued upon, was Confederate treasury notes.

It is settled, and it is now the jurisprudence of this State, that a party to a contract, the consideration of which is Confederate treasury notes, cannot recover thereon.

It is therefore ordered and decreed, that the judgment appealed from be reversed, with costs.

Rehearing refused.

No. 957.—J. M. BEEBE & Co. v. KAISER & BRYAN.

The mere fact of the witness being a party to the record, does not disqualify him as a witness. Where testimony, taken by commission, has been improperly excluded on trial in the Court below, and is in the record on appeal, the Supreme Court will not remand the cause on that account, but will render judgment on all the evidence in the record.

**A**PPEAL from the Third District Court of New Orleans, *Fellowes, J. E. W. Huntington*, for plaintiffs and appellees. *Geo. S. Lacey*, for defendants and appellants.

ISLEY, J. This is an attachment suit instituted by the plaintiffs, a commercial firm, doing business in Boston, Mass., to recover from Isaac Kaiser and W. B. Bryan, residents of Woodville, Miss., the defendants, *in solido*, the sum of five thousand one hundred and twenty-six dollars and interest.

The plaintiffs attached, as the property of the defendants, a considerable quantity of merchandise upon the steamer *Saratoga*, then lying at the levee in the city of New Orleans.

The defendants, by the curator appointed to represent them, filed a general denial.

Robert Semple intervened, claiming to be the *bona fide* and lawful owner of all the property and effects attached, and alleged the same were not liable in law or equity, to be seized as belonging to the defendants, and prayed that it might be decreed, contradictorily with the plaintiff, that he was the sole owner of the goods attached, and be quieted in his possession and ownership of the same.

The plaintiffs answered the intervenor's petition by a general denial, and by consent of the parties the property seized was bonded by the intervenor. Judgment was rendered in favor of the plaintiffs and against the defendants, in accordance with the plaintiffs' petition, and the intervenor's demand, having been dismissed, he appealed.

The case being on trial, the intervenor offered in evidence the depositions of Isaac Kaiser, one of the defendants, to prove that the property attached belonged to him; and there is a bill of exceptions taken by the intervenor to the ruling of the Court excluding Kaiser's evidence, because he is a party to the suit, and interested. The mere fact of the witness being a party to the record, does not disqualify him as a witness. See 1 An. 228. 2 An. 890. 5 N. S. 454. 9 An. 67. If interested, he was incompetent *at the time* to testify. The success of the intervenor would have relieved the property seized from the attachment, and the defendant, whose evidence was offered, from the costs of suit, for the Court would then regularly have been without jurisdiction, and the suit dismissed. 4 An. 187. 14 An. 374. But, if the plaintiff could sustain his claim against the defendant, the witness would testify against his interest



in favor of the intervenor; because, if he maintained this intervenor's title to the property, it would leave the defendants' debt to the plaintiff still due. His interest, thus counterpoised, is against the party calling him. 11 An. 404. 5 Rob. 442. 3 Rob. 227.

We think his evidence was improperly excluded. As the evidence improperly excluded is in the record, it will be considered, and the case will not be remanded. 14 An. 61. 13 An. 445. 12 A. 12 and 50. 11 A. 404. The intervenor's claim, to the property attached, is clearly established.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court, dismissing the intervenor's claims to the property attached, be annulled, avoided and reversed; and it is further ordered, that he be adjudged the sole owner of the goods, wares and merchandise, the property and effects attached in this suit, that he be quieted in his possession and ownership thereof, the costs of intervention to be paid by the plaintiff and appellee.

Rehearing refused.

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No. 932.—N. E. BAILEY *v.* THE CITY OF NEW ORLEANS.

In a question of damages, where private property is taken for public use, and the testimony is so conflicting, that from it the Court is unable to do justice between the parties, the case will be remanded to the Court of the first instance, in order that the *quantum* of damages may be ascertained by a jury of freeholders. C. C. 2008.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.* *Buchanan & Gilmore*, for plaintiff and appellee. *Thomas H. Hewes*, for defendant and appellant.

**TALIAFERRO, J.** The plaintiff claims damages of the city, for causing a canal to be constructed through certain grounds of his, alleging that the act has caused him great inconvenience and loss, and estimating the amount of damage he has sustained at thirty-five hundred dollars. He prays that he have judgment for the amount claimed, and that the city be required by judicial decree to fill up the canal within his boundaries, and to restore his improvements. The answer is a general denial. The Court below awarded five hundred dollars as damages, up to the time of the institution of the suit, with judicial interest from judicial demand; and decreed further, that thirty days from the signing of the judgment be allowed the defendant, within which to institute proceedings according to law, for the expropriation of such part of the property of the plaintiff as may be found necessary for purposes of public utility, on paying to the plaintiff a fair and just compensation for the same, and for such injury as may result to the remaining property of the plaintiff by such expropriation; and in default of such proceedings being taken within thirty days, that the said canal upon the property of the plaintiff be filled up at the expense of the defendant."

From this judgment the city has appealed. The plaintiff and appellee

asks an amendment of the judgment, so that the whole amount of the damages claimed may be awarded to him.

We gather from the record, that in 1864, the digging of the canal in question was authorized by an order of the city authorities, approved by the military authority then prevailing here, for the purpose of completing a system of drainage between the New Canal and Canal Carondelet, and which was deemed important for sanitary purposes. The square, or lots of ground belonging to the plaintiff, through which the new canal passes, lie within the district, the drainage of which was in contemplation. But it does not appear that legal measures were ever resorted to in order to divest the plaintiff of title to the portion of ground taken from him for the purpose of the canal, and to ascertain the amount of injury resulting to him, in other respects, from the construction of this public work, which is among the permanent improvements of the city. We understand the only matter in litigation to be the amount of compensation the plaintiff is to receive for the portion of his ground converted to public use, and the resulting damages. The testimony is conflicting, and from it we do not see that an estimate at all satisfactory, or one likely to do justice between the parties, can be made. We, therefore, think the case should be remanded to the Court of the first instance, in order that the proper legal steps may be taken, and the *quantum* of damages ascertained by a jury of freeholders, as provided for by law. Civil Code, Arts. 2606, 2607, 2608, *et seq.*

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the case be remanded to the Court *a quo*, to be proceeded in according to law. It is further ordered, that within thirty days from the filing of this decree, in the lower Court, the defendant be required to institute against the plaintiff the proceedings required by law, in cases of compulsory transfer of property, to the end that the respective rights of the parties may be ascertained and adjusted. A failure on the part of the defendant to comply with this decree, to authorize the plaintiff to cause that portion of the canal passing through his grounds to be filled up at the expense of defendant, with reservation also to the plaintiff, the right to recover by suit such damages as may be proved to have been sustained by plaintiff from the act of the defendant, in causing the said canal to pass through his grounds. It is further ordered, that the costs of this appeal be paid by the plaintiff.

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No. 501.—GOLDSMITH, HABER & Co. v. MEYER MICHEL.

Where the wife, separated in property from her husband by a judgment of the Court, enjoins the seizure under a *feri facias* against her husband, on the ground that she is the owner of the property seized, she must establish her ownership with legal certainty, otherwise the injunction will be dissolved with damages.

**A** PPEAL from the Third District Court of New Orleans, Duplantier, J. J. Ad. Rozier, for plaintiffs and appellants. Whitaker, Fellows & Mills, for opponent and appellee.

Goldsmith, Haber &amp; Co. v. Michel.

HOWELL, J. Plaintiffs, having obtained a judgment against the defendant, issued execution, and caused to be seized "all the goods, movable effects, furniture, etc., to be found in the premises No. 10 Victory street, and occupied by the defendant," whereupon Mrs. Rosalie Levy, wife of said defendant, enjoined the proceedings, claiming to be the owner of said property by virtue of a notarial act of settlement of a judgment of separation obtained by her against her said husband. The plaintiffs, besides the general denial, aver that said judgment was obtained through fraud and ill practices; deny that she ever had any property, and declare the proceedings for a separation to be a sham, intended to shield the husband's property from his creditors. Judgment was rendered perpetuating the injunction, decreeing the property seized to belong to Mrs. Michel, and condemning plaintiffs to pay \$100 damages, from which they appealed.

It appears that on 22d June, 1858, one Isaac Levy, by authentic act, made a donation to his sister, Mrs. Michel, of a house and lot, and all the goods and merchandise then in said house, or store, in Waterloo, parish of Pointe Coupee, where the parties then resided, the property so donated being estimated at \$2,500; that the said goods and merchandise were estimated in gross by two witnesses, at from \$1,500 to \$1,800; that the business of said store was continued until 1861 or 1862, one witness says, in the name and for account of Mrs. Michel; and another says, in the name of defendant, that subsequently they came to New Orleans; that in June, 1864, after judgment was obtained by plaintiffs, Mrs. Michel instituted suit, and obtained judgment against her husband, decreeing a separation of property, and condemning him to pay her the sum of \$2,500; that on 11th July following, the said Michel and wife appeared before a notary, and in the execution of said judgment, which it is admitted was published, Mrs. Michel acknowledges "to have received from her husband the articles of merchandise described in an annexed invoice, signed, *ne varietur*, by the parties, notary and witnesses," but which is not in the record—which merchandise was valued at \$1,850; and for the remaining sum of \$700 due on said judgment, the said Michel transferred "to his said wife, who accepts all the right and title and interest which he has or may have on or to a certain property situated in Waterloo, in the State of Louisiana;" that the property seized under plaintiffs' *fiery facias*, on 10th September following (1864) was worth upwards of \$500.

We think the evidence too vague to prove the wife's ownership of the property seized. The act by which she claims to have acquired it, does not describe the merchandise conveyed as to character, location, or other particulars, there is nothing to identify the merchandise thus bought by her, with the goods seized. The only evidence bearing on this point is the statement of one witness that he "saw some goods in Victory street, which was seized by the sheriff. She bought some of these goods from different stores here." Nor is the evidence clear, that the goods, given to her in Waterloo by her brother, passed into the possession of and were used by her husband. He may have conducted the store there in the name and for the benefit of his wife, as one of the witnesses states, and the business proved unsuccessful; and he may have established business

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in his own name in this city. The evidence, on which the judgment in favor of the wife was rendered, is in the record, and seems to be inadequate to sustain the judgment, and that which was introduced in this proceeding is not full and satisfactory. The parties may not have committed a fraud as charged, but the wife has certainly failed to prove her title to the property seized, and the only evidence of the husband's embarrassed circumstances, is the judgment in favor of plaintiffs.

It is therefore ordered, that the judgment appealed from be reversed; that the injunction herein be dissolved, and that plaintiffs recover of Mrs. Rosalie Michel and Leon Blum, her surety, \$100 damages and costs, in both courts.

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No. 901.—LOUIS H. PILIE *v.* THE CITY OF NEW ORLEANS.

The Common Council of the city of New Orleans passed a resolution in the year 1856, whereby the city bound itself to pay to any person who should discover and make report, and give due information of the location, and description of any real estate in the city belonging to it, of which there was no record on the books of the city, and to which it shall appear that the city has a valid title, a commission of five per cent. on the value of the same. In pursuance of this resolution, Louis H. Pilie, then holding the office of city surveyor, made examination, and discovered certain real estate previously unknown to the city, of which it took possession, and sold for the benefit of the corporation: *Held*—That in the absence of proof showing that the discoveries and report formed a part of his official duties, as city surveyor, he is entitled to recover the per centage allowed by the resolution.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.* *J. Ad. Rozier*, for plaintiff and appellee. *T. H. Hewes*, for defendant and appellant.

**I**LSLEY, J. In the year 1856, a resolution was adopted and passed by the common council of the city of New Orleans, whereby the city bound itself to pay to any person who should discover and make report, and give due information of the location and description of any real estate in the city belonging to it, of which there was no record on the books of the city, and to which it should appear that the said city had a valid title, a commission of five per cent. on the value of the same was promised. It is shown that the plaintiff did discover and make report, and give due information of certain real estate in the city of New Orleans, belonging by good title to the city, and of which there was no record in its books, to the value of sixty-three thousand one hundred and fifty dollars, and of which the city took undisputed possession, and sold in the year 1858, subsequent to its discovery and the report thereof by the plaintiff. The finance committee of the city, and the city comptroller, recognized the services and the commissions due to the plaintiff, and the city, through its proper officers, paid the amount to the plaintiff. On the 26th August, 1863, the plaintiff was arrested, and confined a prisoner under the order of General Weitzel, approved by Major-General Butler, and was detained in prison, in consequence of the receipt and collection by him from the city of the above commissions, amounting to \$3,182 50, which he was forced to return under duress to the city.

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The city filed a peremptory exception to the plaintiff's action, which was properly dismissed.

It was in effect a plea of *res adjudicata*; that the acts of the commanding-general complained of, done in time of war, while martial law prevailed, which was paramount, was therefore final and conclusive; and that the remedy, if any the plaintiff have, must be sought at the hands of of the government, and not from those of the courts.

This exception would, perhaps, have been worthy of consideration, had any trial of the question involved in this suit taken place before any military tribunal, and a final decision rendered thereon; but, apart from the query, whether the plaintiff, who was a civilian, and could not legally be deprived of his property without due process of law, the action of the military merely forced the plaintiff to place matters *in statu quo*, until his right to the fund could be determined by some competent tribunal, either military or civil; and as the military authorities did not deem it within their province to pass upon the plaintiff's *right* to the commission claimed, it behooves the civil tribunals of the country to do so, as the case is properly before them.

The plaintiff, at the time the services for which he claims commissions were rendered, was the city surveyor; and it is urged against him, by way of defence, that he is not entitled to extra compensation, as those services formed a part of his official duties.

There is nothing in the charter, or the city ordinances, to sustain this defence; indeed, it can hardly be supposed, that had the duty devolved on the surveyor to discover properties belonging to the city, to which it had no clue, it would have offered a recompense to all persons, indiscriminately, to make the search, without a preliminary requisition on their salaried officer to seek for the required information.

The discovery made by the plaintiff was not from plans, papers, or documents in his office; it was the result of his indefatigable and persevering exertions, that the information was obtained from the mortgage and conveyance offices, and from other sources.

The city, voluntarily, held out to whomsoever would prosecute the search in its behalf a liberal compensation, if it proved successful and in proportion to the services rendered; and it is abundantly shown, in the record in this case, that the plaintiff has performed his task faithfully, efficiently and profitably for the city; and upon every principle of law and equity the city should and must keep its faith with him.

His claim was duly credited by the proper municipal authorities, and but for the military interference not to be resisted, would have been long since definitely paid, without objection on the part of the city.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.

HOWELL, J. I concur in the decree in this case, on the ground only that it is not shown, as alleged, to have been the duty of the plaintiff, as surveyor, to furnish the information for which he is claiming payment. Under the 33d section of the city charter, the common council may have



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required this duty of him, in his official capacity. And besides this, by sections 113, 114 and 116 of the charter, it was the duty of the common council to have a book of plans, with a proper general index of every tract, square and lot of ground in the city, made and deposited in the office of the surveyor, whose duty it would then be to transcribe, daily, from the register of conveyances into said book, all changes of ownership which may take place of such property; which would make the surveyor the depository of the information, of which the public authorities seemed to be unaccountably ignorant, and which they have obtained in the manner disclosed in the record.

Under the pleadings and evidence, I can urge no judicial reason why the contract thus made by the agents of the public should not be enforced, whatever may be its merits.

I concur with Mr. Justice Howell, in the opinion above stated.

JAMES G. TALIAFERRO,  
Associate Justice Supreme Court.

No. 990.—P. BOUTTE et als, v. PAUL MAILLARD AND SHERIFF.

A motion to dismiss an appeal, made more than three judicial days after the filing of the record, comes too late.

Where the amount in controversy is less than three hundred dollars, the Supreme Court will dismiss the appeal *ex officio*.

Where a motion in the nature of a demurrer is made, the allegations of the petition are considered as true for the purposes of the motion; but if the cause is put at issue, it then devolves upon the plaintiff to establish his case by proof.

**A**PPEAL from Fourth District Court, Parish of St. Charles, *Beauvais, J. Breaux & Fenner*, for appellants. *A. Derbes*, for appellees.

ILSLEY, J. The motion to dismiss the appeal in this case comes too late, having been made more than three judicial days after the record was filed. 11 An. 613. 12 An. 475. If the amount in controversy was, as it is stated in the motion, less than three hundred dollars, we should notice that *ex officio*; but, in looking into the record, we find it records that sum.

The plaintiffs, in the injunction, represent that proceedings *via executra*, have been instituted against them, to recover the price of certain lands which they purchased from the defendant, and that since their purchase they have discovered that on the 30th June, 1855, by private act, duly recorded in the conveyance office, prior to their purchase, the defendant, their vendor, had sold, or promised to sell the same property now seized, to *A. Boulté*, and that the defendant cannot consequently insist on the payment of the balance of the price still due, until the incumbrance thus placed upon it is removed.

The defendant, Maillard, excepted, and moved to dissolve the injunction, because, among other things, the plaintiffs' petition showed no cause of

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action; but he pleaded the general issue, and a trial, contradictorily, between the parties took place upon the merits.

The motion to dismiss, and for the dissolution of the injunction, was in the nature of a demand, and for that purpose the allegations in the plaintiffs' petition were deemed to be true; but the case being put at issue, it was incumbent on the plaintiffs, on the trial, to make out their case by proof, which they failed to do. *Johnson v. Hickey*, 4 La. 203; 2 An. 221. 14 An. 703.

The Court below, therefore, properly dissolved the injunction, with interest and damages.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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No. 952.—IN THE MATTER OF THE SUCCESSION OF MRS. THOMAS PENISTON.

Where the executor of a deceased tutor, under the order of the Court, files an account of the tutorship, he must show that the estate of the minor has been managed with a scrupulous regard for his interests. The casualty, by which the litigants have been deprived of written evidence, does not dispense them from the necessity of supplying it, as far as possible, by secondary evidence.

**A** PPEAL from the Second District Court of New Orleans, *Thomas, J. Roselius & Philips*, for appellant. *C. Dufour*, for appellee.

*Brief of Roselius & Philips, for appellant.*—The presumption of law existing in favor of accounts of administration rendered, etc., and which will no doubt be invoked by the appellee, has no application here.

For, besides the fact, that no regular account of tutorship was ever filed, but simply a small yellow book containing one entry of debit, and one entry of credit for each year, (these yearly entries purporting to be an addition of the so-called vouchers, which were tied in separate packages, and together with the yellow book constituting the whole exhibit,) the book having been written by Hugh Madden, and the vouchers selected by him from a large lot sent to his office by the deceased in 1860, it appears "he picked up such of the papers and vouchers that he, witness, considered had reference to the succession, and rejected those that did not."

We do not know what justification there was in his selection, how his judgment was guided in this regard, or what constituted his basis of discrimination, except that Dr. Peniston gave him instructions as to which succession the different vouchers had reference to; and while he throws no light on this subject, and does not explain the nature or character of any of these vouchers, he does say, that as "auditor, he found that a great many of those vouchers bore no evidence upon their face of being connected with either of these successions."

Grandmont, the other auditor, says, that as auditor, he examined the vouchers, and that some of them "had reference to the succession of Mrs. Avart, some of them to the succession of Mrs. Peniston, and some

of them to the succession of Dr. Peniston, and some of the vouchers had no reference at all to these successions. He has no recollection of the vouchers; there were some tax receipts on the property of Dr. Peniston, but these were neglected; and there were vouchers there for repairs done on property belonging to Dr. Peniston, but they were very few; there were a certain number of vouchers which had no relation to the interest of the minor. He remembers two mortgage notes, drawn by Dr. Peniston to his own order; presumes that they were mortgage notes, because they were paraphed, and which purported to have been paid in bank; as far as he recollects, he did not find a proof that these two notes had any reference to the account of tutorship," etc. And C. Dufour says, the counsel for appellee, testifies: "Do not know if the summary of the debts was correct or not, and took for granted that Dr. Peniston had charged correctly." The yellow book was in Mr. Hugh Madden's handwriting, the doctor's notary. "The yellow book was headed, but not signed; there were several headings in the yellow book, all by the same penman.

And again, Voisin says: "I think the average rent of the property was between six and eight hundred dollars per month." "I knew no one, as I said before, but Dr. Peniston, being informed that all the property in this parish, except Camp street property, belongs to the minor." The last fact is conceded. The inventories on file establish that all the property mentioned in this parish belongs to the minor, except the Camp street house. "Witness has never collected any rents from said Camp street property." And yet, Grandmont, one of the auditors, says, "that about twelve hundred dollars a year was credited to the minor, in this account, but the same was increased every year to about sixteen hundred to eighteen hundred dollars." A very liberal margin, to say the least of it, between twelve, sixteen and eighteen hundred dollars a year, and six to eight hundred dollars per month.

The testimony of the auditors, Grandmont and Madden, throughout, as well as every circumstance in the record bearing upon this so-called account of tutorship, shows it to be a mere heterogeneous collection of desultory receipts, placed in packages with the single regard to contemporaneous date, and with no reference whatever to their connection with the tutorship. There is really no proof before the Court to support the account, except the statement of Voisin, during his limited agency; beyond this, the Court will no doubt be told that the law will presume that the account is correct, until it is contradicted by proof.

While the law, as heretofore interpreted in Louisiana, considers payments made in course of administration as *prima facie* correct, this principle has only been carried to the extent of contests on accounts which had been previously regularly submitted to the Court, and after due publication, etc., approved and homologated. *Succession of Tucker*, 13 An. 464; 7 An. 175; 3 R. 286. It has never been extended to a case similar to the one now before the Court. For the present purports to be an account of tutorship, embracing a period of eighteen years; no previous account or accounts having been submitted during that long period of time, as might have been done by the tutor in his own protection, under the act of 1855; which previous accounts being duly homologated, would have constituted *prima facie* evidence of their contents, as is

## Succession of Peniston.

expressly set forth in the statute itself. But, *de son tort*, he neglected during his lifetime to pursue that course of conduct, which would have afforded him ample protection, and which it was his duty to his minor child to adopt. And now, with every indication of a studied neglect staring out from nearly every page of the record, his representative seeks the benefit of a legal presumption, only established in favor of vigilance and good faith.

And even, supposing for argument, that the appellee is entitled to the benefit of this presumption, we do not know how it can be practically applied by the Court. There is no account of tutorship before the Court. The yellow book and vouchers are burnt. There is nothing left but the general summary made by his counsel, C. Dufour, Esq., and he simply carried down balances which he took for granted were correct, and sought to introduce a little classification and system into what was chaotic and confused. There is nothing to stand upon. No facts upon which to base any presumption, except those furnished by the account of opposition, and the moment the Court goes beyond this, and the evidence adduced under it, everything is confusion. If a regular account had been furnished, no doubt a copy would have been reserved—the executor reserved a copy of his own account, as did also Mr. Dufour of his—and then the Court at least would have been able to see in what consisted the charges, which it is now called upon by the appellees to recognize as correct, without knowing anything about them. It will surely be stretching a presumption too far, to ask for its application in this case, where certain figures, called the sum total of various transactions are alone given, and we are without any knowledge of how this sum total is arrived at, or of the current transactions which make up the same.

And when it is further known that the yellow book and vouchers accompanying it, and dignified by the name of account of tutorship, had few of the essential elements of such an account; that it was written, and the so-called vouchers gathered together by a total stranger, who was in no manner connected with the transactions which he sought to record, who merely gathered the vouchers from loose and floating papers contained in a newspaper bundle, rejecting or selecting such as his untutored discrimination suggested; that it does not appear that this so-called account ever met the approbation of the tutor; that he ever signified his assent to the same, either orally or in writing, or identified these papers as his own account of tutorship; but that the same were simply and only found in his possession after his death; that at the same time the tutor administered on the succession of Mrs. Avart and Mrs. Peniston, and the property of his minor son; that his *alter ego* mixed up and doubled charges and items of debit belonging to the two first successions, with the matters of the minor; that there were acknowledged double charges against the minor, to exceeding five thousand dollars in amount, which were erroneous; that the showing was unreliable, erroneous, and made up principally of vouchers, which, on their face, had apparently no connection with the matter of the tutorship, and in favor of which no explanation was offered. When all these things are known, we are utterly unable to see on what principle of law or equity the presumption of the law can be invoked, or its application allowed by the Court.

If all these considerations are not sufficient to show how inapplicable this presumption, established in favor of vigilance and good faith is to this case, then the broad and indisputable proof which has been adduced on the opposition, and to which the Court has been already referred, contradicting the so-called account of tutorship, and establishing the claims of the opponent, not only disputes the presumption, but makes out a positive showing in favor of the appellant.

Our learned adversary, as well as the District Judge, considered this a fit occasion to read the opponent a moral lecture on the sacred duty of honor and respect which is due by the child to the parent.

His honor, the District Judge, winds up his opinion by observing that "there is a consolation in the thought, that if there be any error in the conclusion to which I have arrived in this matter, no real distress can be given the opponent, and that perhaps it may cause him to entertain a better opinion of his deceased father."

If the conclusion of the District Court Judge had been based on the facts found in the record, and the law applicable to them, there would be some force in the observation.

But we have already abundantly shown that the conclusion is founded on neither the one nor the other. It is certainly a novel idea that it is of no great moment, whether a party loses a hundred and forty odd thousand dollars through the inattention or ignorance of a judge, provided he is not reduced thereby to absolute poverty and distress.

The opponent and his counsel are well aware of the delicate position which they occupy, and have endeavored, as far as possible, to avoid saying anything that was not strictly necessary for the assertion and vindication of his right to his patrimony, which is sought to be wrested from him in this litigation.

We will barely refer to the testimony of Judge Duplantier, found at page 157 *et seq.* of the record.

*Brief of Cyprien Dufour, for Appellee.*—Shortly after the death of Thomas Peniston, his son, Joseph Allard Peniston, claimed his emancipation, and obtained it. He then entered a rule against the executor of his deceased father for an account of tutorship, and the following order was issued:

"Let Joseph Lallande, testamentary executor of Thomas Peniston, be ordered to file an account of tutorship to the petitioner, due by Thomas Peniston, deceased, as natural tutor, within the legal delay."

The tutorship embraced a period of nearly eighteen years. The executor knew nothing of this administration; of course, it was impossible for him to render upon his own responsibility the account required. But it is in evidence that the deceased, within a short year before his death, and no doubt in view of his approaching dissolution, had prepared and liquidated his accounts with his son, and for more accuracy had handed over all his vouchers to his notary, and had given him his instructions, so that the whole might be arranged with some system. This account, and the vouchers, were found at the late domicile of the deceased, and are thus described in the inventory:

"An account book found among the effects of said deceased, containing



## Succession of Peniston.

accounts of the deceased, with the estates and successions of Mad. Peniston and Mad. Avart, both deceased."

"Eighteen packages of receipts or vouchers, from the years 1845 to 1862, both inclusive, having reference to and being a part of the account of said deceased, with the succession and estate of Mad. Peniston, hereinbefore inventoried." "Eight packages of receipts or vouchers, from 1855 to 1862, both inclusive, having reference to and being a part of the account of the deceased, with the succession and estate of Mad. Avart, hereinbefore inventoried."

These were naturally presented to the Court, as the accounts prepared by the tutor himself, with an addition by the executor, comprising the short interval which passed from the closing of those accounts until the death of the deceased.

An opposition having been filed in the name of Joseph Allard Peniston, the matter was referred to auditors. These auditors withdrew from Court all papers having any connection with the tutorship. They took away the accounts and vouchers drawn up by the late tutor, the additional account of the executor with accompanying receipts, the mortuary proceedings in the succession of Mad. Peniston, and those in the succession of Mad. Avart; and whilst in their possession, a fire occurred in the office of Mr. Madden, and the whole was destroyed.

After this deplorable accident, the opponent entered a new rule, claiming that "Joseph Lallande, testamentary executor of the last will of Thomas Peniston, natural tutor of his son, do show cause why he should not file another account of the tutorship of said Thomas Peniston, of the affairs of said appearer during his minority, in lieu and stead of the account of tutorship, so lost and destroyed as aforesaid, and also supply, by copies from his possession or to be procured, as far as possible, the original papers lost and destroyed as aforesaid; or in default thereof, why the opponent should not have judgment in his favor against said Thomas Peniston, deceased, as set forth in his opposition to said tutor's account."

The executor, in his answer, referred to the original order, calling upon him to file the account of tutorship, and said: "That from personal knowledge he was unable to comply with such an order, but having found among the papers of the deceased a full account of said tutorship, with accompanying vouchers, prepared from year to year, until the first day of January, 1863, he presented the whole to the Court, together with an additional account prepared by himself, by means of such vouchers as he could find, and running from the said 1st of January, 1863, to the month of February, 1864, about three months after the death of the said late tutor, when his minor son obtained a decree dispensing him with the age of majority. And both these accounts were supported and justified by vouchers marked and classed under proper headings, and filed into Court, in compliance with the application of the said Joseph Allard Peniston. That he has kept no copy either of the account itself or of the accompanying vouchers; but in the private record of his counsel, he has found the original draft of the report he made touching the accounts of the deceased, ending the 1st of January, 1863, which he produces into Court in the same condition it was found. And he furnishes a copy of

## Succession of Peniston.

the additional account presented by him, and covering the remainder of said tutorship until the month of February, 1864, which copy he has prepared from his own notes and memorandum."

The precision and method, with which the accounts were prepared by the tutor, forbid all idea of looseness or carelessness on his part. There was a separate account, with regard to the succession of Mrs. Avart, of whom the opponent was universal legatee. This estate consisted in slaves and vacant lands in the parish of Jefferson. The whole was sold, and the proceeds carried to the credit side. This fund was debited by the amount of all administrative and judicial expenditures incurred by the estate itself.

There was another account entitled: "*Succession of Madame Peniston.*" This estate consisted altogether in improved property situated in the city of New Orleans. The account showed on one side the amount of revenues collected, and the other comprised the payment of taxes, insurance, repairs, and price paid on building contracts. There was an item of about four thousand dollars for a sumptuous tomb, erected to the memory of the mother of the opponent. All general disbursements were charged to this estate.

The first account exhibited a balance in favor of the minor	
of.....	\$101,941 99
The second account gave a balance in favor of the tutor of...	31,038 69
Net balance in favor of minor.....	70,903 30
The additional account prepared by the executor himself	
showed a balance against the minor of.....	6,767 99
Definitive balance in favor of the minor.....	64,135 31

The manner in which the accounts were prepared is thus described by the notary: "Witness is a notary public for five years, and previous to that time he was in the office of Ricardo. He was personally acquainted with the late Dr. Peniston; was chosen by Jos. Lallande as the notary of the succession, and as such made the inventory. He recollects the account-book and vouchers stated by him in the supplemental inventory. This book was entirely written by witness, at the instance of Dr. Peniston, and the vouchers were put up by witness to the best of his recollection. He thinks he did this in 1860; it may possibly be in 1861. He thinks it was in 1860. He made the packages of vouchers under the date they bore; and if any of the packages are dated in 1862, he must have made them a second time in 1862. These were the same papers he found when he made the inventory, and they were the same papers he took from this Court as auditor. The book was a copy-book, with a yellow cover, with some printing in it; this book had a debit and credit side, and purported to be a recapitulation of the amounts contained in the packages of vouchers, and bearing a credit side of income received. One page of said book was a statement of different sales by auction, and the amounts realized thereby. The total of the receipt was brought up under one item for each particular year. The vouchers were classified by witness himself, and were put up under their respective dates, and the packages for each were labelled properly. These papers were in his office at the time of the

conflagration, and were all destroyed, and he has not been able to get any of them since."

And upon his cross-examination, the witness said further: "Dr. Peniston sent all the papers and vouchers in a newspaper bundle, to the office of witness for the purpose of being classified by him. He requested him to look over the papers, and said they were receipts, and to make from them a statement; and, at the request of Dr. Peniston, he picked up such of the papers that he considered had reference to the successions, and rejected those that did not. Dr. Peniston gave him the instructions, as to which succession the different vouchers had reference to."

How these accounts were reported to the Court by the executor, how the copies furnished had been made, how and to what extent the whole had been revised and verified by the executor's counsel, is fully set forth in the testimony of the counsel.

The circumstances attending the preparation of the accounts entitle them to peculiar favor. It is in proof that Dr. Peniston had been suffering for years; in 1863, his life was rapidly wearing away; he died in December, 1863. That a father and natural tutor, *in articulo mortis* as it were, should deliberately sit down and write out false accounts to deceive his minor son, is a thing that is not easily admissible. And in the performance of this duty, he was not alone; the employment of a notary to assist him is certainly not suggestive of any concealment. Mr. Madden was well known for his thorough business habits; had acquired much experience in the notarial profession, and the services required of him, on this occasion, were squarely within the line of his precedents.

These facts are important features in the case. They raise presumptions so strong, they impart rules so safe, that the law has never disregarded them. This Court said in an analogous case: "In 2 N. S. 298, the account of an executor, accompanied by the vouchers in support of it, was held to be *prima facie* evidence of its correctness." In 6 N. S. 335, it was said that the acknowledgment and payment of debts by tutors and curators, which they know to be owing by the estate which they administer, may be considered as *prima facie* evidence of their correctness. We think these principles are reasonable and just; and if no presumptions of bad faith or dishonesty are raised, they should have their proper effect. When anything of that kind is presented to rebut the *prima facie* evidence, such as extravagant charges, the purchase of articles or supplies not probably needed, or concealment of funds, or anything of the kind, Courts cannot be too vigilant and strict in their investigations and judgments; but when there is every appearance of good faith and correct management, executors, administrators, tutors, and other fiduciaries, ought not, in the settlement of their accounts, to be held to the strictest rules of evidence. It cannot be expected that they can always have witnesses to their various transactions, and were they obliged to prove the signature to every receipt for debts paid, supplies purchased, or other matters, the expenses of summoning witnesses, and of their attendance; the taking of depositions, and procuring testimony generally, would involve successions and the property of minors in heavy and oftentimes unnecessary expenses." *Succession of William Frantom*, 3 R. 286.

If such is the doctrine generally, with how much force will it apply to our case? I have no reason to believe that any imputation against the memory of the father will result from the opposition of his son to his accounts, but it may not be out of place that the Court should see in what estimation Dr. Peniston was held by those who knew him best. Madame Avart, from whom the opponent has obtained every dollar he now possesses, was the adopted mother of Amélie Duplantier, and had married her to Dr. Peniston. They lived together. Madame Avart continued to reside with the doctor, even after the death of her adopted child, and remained with him till the day she died. She had made her last will in 1845, and had appointed Mr. Canon her testamentary executor. In the year 1851, she issued four promissory notes to the order of Dr. Peniston, amounting to the sum of fifty thousand dollars, all dated the same day, 20th April, 1851.

This was clearly a donation, which, however, the donee has never used; the notes were found among his papers after his death, and are thus described in the inventory: "Four promissory notes for the sum of twelve thousand five hundred dollars each, drawn by Veuve Louis Avart, dated the 20th April, 1851, and made payable to the order of said deceased, in one, two, three and four years, respectively, after date."

On the 14th June, 1851, not quite two months after the making of the fifty thousand dollars notes, Madame Avart made a codicil to her testament, and appointed M. Peniston her testamentary executor, with full seizin.

Such were the evidences of high regard bestowed by Madame Avart, which, combined with the presumptions drawn from nature and from law, will give to the deceased father fair standing in the unexpected assault sprung upon his memory.

That there may be inaccuracies and unimportant flaws in the account left by the tutor, I am not prepared to contest. If there be any, the Court will correct them. But, upon close scrutiny and general comparison, the account will be found correct in its main features.

Mr. Peniston, as the executor of Mrs. Avart, presented a tableau of the estate on the 10th of June, 1856.

From that day, he became seized of the clear residue of the succession as tutor of his son.

This residue was classified as follows, viz :

Real estate, appraised at.....	\$90,676 00
Slaves unsold, do.....	3,300 00
Cash in Bank.....	474 30
Bills receivable.....	1,617 00
Claims inventoried.....	31 25
	<hr/>
	\$96,098 55

This was the full measure of the estate to be administered by the father for the use of his son.

Now, by reference to the various *proces-verbals* of sales, we will at once determine how much the real estate and the slaves were sold for.

The real estate was sold under two separate orders of Court; the first by Julian Neville, and the other by Beard & Co. The *proces-verbals* of

## Succession of Peniston.

these auctioneers were first introduced by the opponent; and duplicates were afterwards offered by Lallande's counsel. This will explain how there are four *proces-verbals* in proof, when in fact there were only two sales.

The slaves were sold by Gardner Smith.

There is also in evidence another *proces-verbal* of a sale made by Vignié, but this was a sale made during the liquidation of the succession, and was included in the tableau. So that it has no connection with the tutorship.

Let us sum up the proceeds of the several sales, viz:

By first sale of real estate, as per <i>proces-verbals</i> .....	\$25,140 00
By second sale of real estate, as per <i>proces-verbals</i> .....	83,820 00
By sale of slaves, as per <i>proces-verbals</i> .....	4,545 00
	<hr/>
	\$113,505 00

Here is then the entire amount of the gross proceeds of the Avart estate, which the tutor has received for his son. If we turn to that portion of his account of tutorship, headed "*Succession of Madame Avart*," we find that the minor is credited, after payment of all administrative and judicial expenditures incurred for the liquidation of this vast estate, with the net sum of \$101,941 99.

The margin for disbursements is shown to be less than twelve thousand dollars, which is very moderate. The correctness of this part of the account is therefore easily vindicated.

It is true, the item entitled, Cash in Bank for \$474 30, was omitted in the tutor's account. This is an error the Court may easily correct.

As to the two other items, for bills receivable, \$1,617 00, and for claims inventoried \$31 25, which were not accounted for in the tutor's book, the witness by whom the omission was proved seems truly to have explained it in saying that the items referred to claims which perhaps had never been collected.

In the other branch of the account, headed "*Succession of Madame Peniston*," there has been no sale. This estate consisted in city property, bearing monthly rents. The minor is here debited with a balance of \$31,038 69. But on the other hand, new buildings were put up at a cost of twelve thousand dollars.

The bill for repairs, and some of the taxes from December, 1858, to November, 1862, a period of about four years, is proved by Dr. Peniston's agent to have amounted to the sum of \$2,939 87.

Mr. Voisin testifies he has acted as agent for Dr. Peniston, from the 1st July, 1858, to the 31st December, 1862. During this period of time, he has collected all the rents, and paid out all the expenses upon the property. His book of agency, which is in evidence, shows the following result, viz:

To amount of expenses from 1st July, 1858, to 31st December, 1862.....	\$17,218 68	
By amount of rents collected during the same time.....		\$16,481 25
Balance due by property situated in parish of Orleans.....		737 43
	<hr/>	<hr/>
	\$17,218 68	\$17,218 68



The Court will not fail to notice that the debit of the agent's book does not contain a single item of personal expenses, either for Mr. Peniston or for his son, during these four years. All the charges refer to taxes, insurance, repairs, and new buildings.

The proof thus afforded by the agent's book for a short term of four years, explains to a certain extent the balance found by the tutor against the minor.

The opponent seems to ask with amazement what his father has done with his revenues. We must turn him over to Mr. Voisin, who shows that all his revenues for four years were not enough to pay the tutor for repairs and improvements made. And will not the opponent admit that his father had other expenses to incur, besides those for repairing his houses and building new ones for him? Expenses of house-keeping; wages of opponent's nurses, for he was an infant when he lost his mother; charges for supporting, maintaining and educating him, according to his situation of fortune; travelling expenses, for he indulged quite freely in this luxury; all these very material details in human life, the opponent appears to have completely overlooked. Madame Avart, in her testament, had said:

"Je veux que les revenus de mes biens soient employés à son entretien et à son éducation, (meaning her legatee); s'il y a de l'excédent, il devra être placé en propriétés foncières."

I take from the testimony of Joseph Lallande the following extract, viz :

"All the items upon the debit side of that part of the account of tutorship, which is from my own vouchers, were based upon receipts received from Paris, and signed by opponent, and for money drawn there by him."

Another witness, Miss Armantine Duplantier, said :

"Dr. Peniston's son has partly been raised here; has been one year in Georgia, afterwards in Switzerland, and afterwards in Paris."

The opponent, however, passed pretty cleverly over these matters; and presuming he could do better than his deceased father, he has made an account of his own invention, which he offered to the District Judge as the one which should have been rendered. The folly of the author is apparent upon every page he has written. He puts down all he can reasonably imagine must have been collected for him; but throughout the eighteen years embraced in the account, there is not on the debit side a single payment allowed for taxes upon his property; not one for insurance; not one for repairs; not one for keeping the house where he was raised; not one for his maintenance; not one for his education; not one for his voyages; not a word is said about the three new buildings which were put up by the tutor, and have increased considerably the revenues he now enjoys; nothing is said of the sum of four thousand dollars expended upon the tomb erected to his mother and her benefactress, Madame Avart.

And what, at last, makes the thing utterly ridiculous, is the exhibit shown for the year 1848, where he gathers along an amount of rent going up to \$2,232 00, whilst his ingenuity could find only one item of expenditure to be carried to the debit side, and amounting to the sum of \$175, for the whole year round.

And in this way the opponent has run up his own account to the enormous sum of \$199,599 99, including interests from year to year. Notwithstanding the cleverness displayed, I must confess, for the sake of justice to the other heir, his honor below was right in disregarding it.

TALIAFERRO, J. The controversy in this case relates to a tutor's account. Thomas Peniston died in the latter part of the year 1862. He had been the natural tutor of his minor son, Joseph A. Peniston, during a period of about eighteen years. During this time he administered a large estate, exclusively the property of the minor.

Shortly after the death of the tutor the minor was emancipated, and required from the executor of his father's estate the rendition of an account of the tutorship.

It appears that a short time before his decease, Dr. Peniston, father of the minor, had deposited in the hands of a notary a number of papers relating to his business generally, and among them the vouchers and documents of various kinds having reference to the tutorship of his minor son, and intended the notary to make out a statement of the tutorship. An account was made out accordingly, which in May, 1864, was presented by the executor, with accompanying papers as vouchers. The account was offered by the minor, and as the investigation of the subject involved the examination of a mass of papers relative to transactions running through so many years, the Court referred the matter to auditors. During the time the auditors were engaged in their functions, the building in which their labors were conducted took fire, and was entirely destroyed, and with it the tutorship account, the oppositions to it, the mortuary proceedings and all the papers of every kind connected with the settlement in contemplation were consumed.

In March, 1865, on the part of the minor, an order was rendered directing the executor to file another account. To this order he responded by filing an account identical as to amount of indebtedness of the tutor, with the former, stating that he was enabled to do so from original drafts of papers in the hands of his attorney, but averred his inability to render any more explicit or detailed account. This second account showing like the first, a balance due the minor of \$64,135 31 was offered. On behalf of the minor an account against the tutor was presented of \$199,959 26, made up as alleged of debts, revenues and income collected, the price of property sold, and interest; the amount claimed being as stated, a net balance after allowance made for all expenses, outlays, commissions, etc., as credits.

The opposition was dismissed, and the opponent has appealed.

We are unable to concur with the Judge *a quo* in the conclusion, that the account rendered by the executor should be confirmed. At its first presentation it was strenuously opposed, and we have no grounds to infer that the last evidence would have sustained it. Besides, there is not wanting in the record evidence to satisfy us of the probability, that the estate of the minor was not managed with a scrupulous regard to his interests. How, in the present state of the controversy anything satisfactory or conclusive can be arrived at, or how, under the pleadings and the meagre proof, or rather no proof at all in support of the tutor's account,

any judgment can be rendered that would do justice to the parties, we are at a loss to conceive.

The casualty by which the litigants have been deprived of written evidence, does not dispense them from the necessity of supplying it as far as possible by secondary evidence.

We feel it incumbent upon us to return the case to the Court of the first instance, in order that it may undergo further examination, with the view of adjusting more definitely the rights of the parties.

It is therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the case be remanded to the lower Court for further proceedings according to law, the costs of this appeal to be sustained by the succession.

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No. 971.—JOHN E. KING v. HUSTON, HUBBELL & Co.

A contract, the basis of which is Confederate notes, will not be enforced.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J. Whitaker, Fellowes & Mills*, for plaintiff and appellee. *Clarke & Bayne*, for defendants and appellants.

HOWELL, J. This is a suit by attachment to recover of defendants a sum of money alleged to have been received by them on or about the 16th of April, 1862, from Messrs. Soery & Gore, in Memphis, Tenn., to be delivered to plaintiff in this city.

The answer is a general denial.

It appears from the evidence, that on the 2d or 3d June, 1862, Soery & Gore, at Memphis, entrusted to one of the defendants a lot of Confederate notes, to be delivered to plaintiff in New Orleans, for which the following receipt was given :

"Received, Memphis, Tenn., 1862, of Soery & Gore, thirty-eight hundred and ninety-two dollars and fifty-two cents in Confederate notes, which amount we are to deliver to John E. King, at New Orleans.

(Signed)

HUBBELL, HUSTON & Co."

A portion of this amount was delivered to plaintiff in September, 1862, through the agents of the defendants here, and the balance is claimed in this suit, for which plaintiff obtained judgment, and defendants have appealed.

On a motion for a new trial in the lower Court, the defendants, among other grounds, urged that the obligation, if any exists, arises out of a consideration—Confederate notes—void in law, and cannot be enforced. As has been so frequently held by this Court, this defence must prevail. It is unnecessary to notice other points raised and elaborately argued.

It is therefore ordered, that the judgment appealed from be reversed, and that there be judgment in favor of defendants, with costs in both courts.

## No. 1253.—ABAT &amp; GENERES et als. v. EMELINE J. PENNY et als.

A mortgage was executed by Mrs. E. J. Penny in 1857, for \$8,000 on real estate, in favor of Lobit & Charpentier, commission merchants, for the purpose of securing and covering advances made, and to be made by said commercial house, for the benefit of the plantation of Mrs. E. J. Penny; after the execution of the mortgage, the commercial house of Lobit & Charpentier was changed by the addition of new parties, and styled Lobit, Charpentier & Co; in the year 1862, Mrs. E. J. Penny executed three promissory notes in favor of the new firm of Lobit, Charpentier & Co; the holder of the notes brings suit to recover the amount, and claims the benefit of the mortgage in favor of the old firm, executed in 1857: *Held*—That the addition of another party in the firm dissolved the old firm, in whose favor the mortgage was executed, and created a new firm, in whose favor the notes were given, and the new firm could not avail themselves of the mortgage given in favor of the old firm.

In a revocatory action, where no allegation of insolvency is made in the petition, evidence cannot be introduced to prove the fact.

Without the allegation and proof of insolvency the revocatory action cannot be maintained.

**A**PPEAL from the District Court, Parish East Baton Rouge, *Posey, J. Farrot & Lamon*, for plaintiffs and appellees. *Dunn & Herron*, for defendants and appellants.

**LABAUVE, J.** This suit is brought to recover from Mrs. Emeline J. Penny, the sum of \$8,500, with interest, and a mortgage on her plantation, and to annul a judgment obtained on the 24th November, 1865, on confession, in favor of Mrs. Jane E. Scott, against the said Mrs. Emeline J. Penny for \$11,081, with eight per cent. interest per annum, and with a mortgage on said plantation, on the ground that said judgment was null and void, and rendered in fraud of petitioners' rights; and an execution, having issued on said judgment, plaintiffs obtained an injunction to arrest the sale.

On the 4th March, 1852, Mrs. E. J. Penny mortgaged her said plantation to Bogart, Foley & Avery, to secure the payment of \$7,000, evidenced by her two notes, one due 4th February, and the other 4th March, 1853, each for \$3,500.

On the 7th April, 1855, the said Mrs. Penny mortgaged the same property to said Mrs. Jane E. Scott for \$2,206, evidenced by her note, payable one year after date.

On the 30th January, 1857, the said Mrs. Penny mortgaged the same, and other property, to the firm of Lobit & Charpentier, to secure said firm for advances to be made to her by said firm, to the amount of \$8,000, to carry on her said plantation.

The mortgage in favor of Bogart, Foley & Avery, and Mrs. Jane E. Scott, were respectively reinscribed on the 14th and 16th of October, 1865.

The judgment in favor of Mrs. Jane E. Scott was rendered upon the notes and mortgage in her favor, and also upon the notes and mortgage in favor of Bogart, Foley & Avery, which had been transferred to her by said mortgage creditors.

Mrs. Jane E. Scott answered by a general denial of all the allegations set forth in the petition. Admitted that she was a judgment and mortgage creditor of said Mrs. Penny, and that said amount was justly due her. She prayed that the injunction be dissolved, with general and special damages.

The District Court, after hearing the evidence, decreed that the judgment in the case of *Mrs. Jane E. Scott v. Emeline J. Penny*, No. 627, in so far as the mortgages were therein recognized to have rank, the one from the 4th March, 1852, and the other from the 7th April, 1855, be annulled and revoked; that it be so amended as to give the mortgages rank, the one from the 14th October, 1865, and the other from the 16th October, 1865; and that the land be seized and sold to pay plaintiffs' debt, interests and costs. That the defendant, Emeline J. Scott, wife of D. H. Penny, pay said plaintiffs the amount claimed by them, with the interest. That the petitioners' rights of mortgage upon the land be recognized to date from the 30th January, 1857, and the injunction dissolved, and the defendants to pay all the costs of suit.

The defendant, Mrs. Jane E. Scott, judgment creditor, alone appealed. The judgment debtor, Mrs. Penny, did not appeal, and is not before us.

There are several bills of exceptions taken to the opinion of the Court below, but the view we have taken of the case, makes it unnecessary to pass upon them, except one which will be noticed hereafter.

The first question that is presented is: Does the mortgage, executed by Mrs. Penny, on the 30th January, 1857, in favor of the firm of Lobit & Charpentier, to secure said firm for all allowances or acceptances to be made to her to the amount of \$8,000, cover and secure the notes sued upon, and executed by said Mrs. Emeline J. Penny, on the 1st February, 1862, the 12th February, 1862, and the 1st March, 1862, all payable to the order of Lobit, Charpentier & Co.?

We are of opinion it does not.

The evidence shows that one A. Testrou became a partner, and made the company; from that moment the old firm was changed, and became a new one, with different parties, interest and liabilities; the creditors and debtors of the old firm, were not so of the new firm, and *vice versa*. It was two different houses in contemplation of law; creditors of the old firm could not have pleaded compensation against a debt due the new firm. Suppose Mrs. Emeline J. Penny held notes of the old firm, and this suit were brought against her by Lobit, Charpentier & Co., in lieu of the plaintiffs, she could not have opposed the plea in compensation. *Ellis v. Fisher*, 10 A. 479, 482.

We have concluded that the plaintiffs have no mortgage.

The second question is relative to the avoidance of the judgment by the revocatory action.

On the trial of the case below, plaintiffs offered in evidence an extract from the assessment roll, to show the value of Mrs. Penny's property, to establish insolvency; to which evidence Mrs. Scott's counsel objected, on the ground that there was no allegations in the petition under which such testimony was admissible, the Court overruled the objection, and admitted the evidence; a bill of exception was taken to the ruling of the Court.

We believe the Court erred.

In actions of this kind, the allegation and proof of insolvency, is most essential, without which the revocatory action cannot be maintained. The evidence should have been rejected.

It was incumbent on the plaintiffs to allege and prove that Mrs. Penny



Abat &amp; Genes et als. v. Penny et als.

was in insolvent circumstances, when she consented to these proceedings, to the knowledge of Mrs. Scott, the judgment creditor.

Nowhere in the petition, or in the record, are there such allegations or proof. 4 L. 256, 250. 4 R. 408, 438. 10 L. 363. C. C. Art. 1973, 79, 80. 12 R. 141. 11 L. 419. 6 An. 87. The solvency and insolvency must be alleged and proved as required by Article 1980 of the Civil Code.

We are of opinion that the plaintiffs have failed to make out their case in their revocatory action against Mrs. Jane E. Scott, in not proving the insolvency of Mrs. Penny, and knowledge thereof in Mrs. Jane E. Scott.

We think that this case does not require damages, as the judgment bears eight per cent. interest.

It is therefore ordered and decreed, that the judgment appealed from, so far as it concerns and affects Mrs. Jane E. Scott in the revocatory action, be annulled and avoided, leaving in force the personal judgment rendered against Mrs. Emeline J. Penny in favor of plaintiffs. It is further ordered and decreed, that the revocatory action brought to annul the judgment and the mortgage in favor of Mrs. Jane E. Scott be dismissed, as in case of nonsuit. It is further ordered and decreed, that the injunction be dissolved, the plaintiffs and appellees to pay costs of this appeal.

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No. 1314.—JEAN BETHANCOURT v. NATHAN STEPHENS.

Plaintiff enjoins an order of seizure and sale sued out by defendant. The injunction is dismissed on a rule taken by defendant, and plaintiff appeals without making the surety on his injunction bond a party to the appeal; *Held*—That the surety is a party to the suit, having an interest that the judgment appealed from remain undisturbed, and should be made a party to the appeal.

Where the record of appeal shows that the judgment of the lower Court was not signed, the appeal will be dismissed.

The terms of the District Courts of New Orleans were fixed by the act of March 29th, 1865, from the first Monday of November until the last Monday of July.

A motion to dismiss an appeal, because the transcript does not contain certain evidence, will not be maintained, where the transcript does not show that such evidence was adduced.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J.* A. Robert, for plaintiff and appellant. Hornor & Benedict, for defendant and appellee.

HYMAN, C. J. Plaintiff obtained an injunction prohibiting the defendant and the sheriff from selling a lot of ground under an execution in the case of *Nathan Stephens v. Mr. and Mrs. Decheaux*.

Defendant obtained a rule on plaintiff to show cause why the injunction should not be dissolved with damages, and on the trial of the rule the District Judge made it absolute, and dissolved the injunction, with damages.

This judgment was signed on the 28th January, 1867.

On the 30th January, 1867, the plaintiff appealed from this judgment, without making the security on his bond for injunction a party to the appeal, whom the law declares, in such a case as this is, a party plaintiff in the suit.

Defendant has filed a motion to dismiss this appeal on various grounds, one of which is, that all parties in interest have not been made parties to the appeal.

It is apparent that the security on the injunction bond, who is a party to this suit, has an interest that the judgment appealed from should remain undisturbed; and, therefore, he should have been made a party to the appeal.

On the 30th January, 1867, the District Judge rendered judgment, dismissing the suit, and omitted, as the transcript shows, to sign the same.

On the 1st February, 1867, plaintiff and his security obtained on motion in open Court an order to appeal from the judgment of the 28th January, 1867, and the unsigned decree of the Court dismissing the suit.

A judgment dismissing a suit is a final judgment, and final judgments must be signed by the Judge. Without his signature they are not judgments, and have no effect, and of course cannot be appealed from. It is only from judgments, final or interlocutory, working irreparable injury, that appeals are taken.

The defendant has also filed a motion to dismiss the appeal taken on 1st February, 1867. The first ground for dismissal is, because the bond given for appeal is not sufficient in amount to warrant a suspensive appeal.

If the bond be sufficient in amount, either for a suspensive or devolutive appeal, the appeal cannot be dismissed on this ground.

The bond is given for \$1,200, the amount fixed by the Judge in his order for appeal. This amount covers the cost of suit, and therefore the bond is sufficient in amount for a devolutive, if not for a suspensive appeal.

The second ground is, that the appeal was taken at a different term of the Court from that in which the judgment was rendered, and that appellant should have proceeded by petition for appeal, and given citation.

A party may, by motion, obtain from the Court, an order for appeal from a judgment, at the same term of the Court in which the judgment was rendered. When he does so, he is not required to present a petition for appeal, nor is he bound to have citation or notice of appeal served on the appellee.

The question then is, whether the appellant obtained the order for appeal at the same term of the Court in which judgment was rendered.

The act relative to the District Courts, for the parish and city of New Orleans, of March 29th, 1865, declares that the District Courts of New Orleans, shall be opened from the 1st Monday of November to the last Monday of July. This act repeals all other provisions of law on the same subject-matter.

What were the terms of the District Courts of New Orleans before the passage of this act it is needless for the purposes of the motion to enquire; for by the act their terms were, when the appeal was taken, from the 1st Monday of November to the last Monday of July.

The order of appeal was granted in the term in which judgment was rendered.

The third and last ground for dismissal is, that the transcript does not

contain certain evidence which appellee declares was introduced.

The transcript does not inform us that such evidence was adduced.

It is decreed that the appeal taken by plaintiff on the 30th January, 1867, be dismissed; that the appeal taken by plaintiff and his security from the unsigned judgment, decreeing the dismissal of the suit, be dismissed.

That thus far the motion of appellee to dismiss be sustained, and that in other respects it be overruled.

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No. 756.—ADELE E. WESTHOLTZ, Widow of David Smith, *v.* H. WILLIAM WESTHOLTZ.

Heirs entitled only to the residuum of a succession, should not interfere to take property out of the hands of the administrator until the debts and charges of the succession are paid, and the final account of the administrator homologated.

**A**PPEAL from the Second District Court of New Orleans, *Thomas, J. Roselius & Philips*, and *C. E. Schmidt*, for appellee. *Durant & Hornor*, and *C. Redmond*, for appellant.

**ISLEY, J.** The plaintiff, one of the children, and legal heirs of Mrs. Elizabeth Retaud, deceased, has instituted against her co-heirs and co-proprietors, the present suit for a partition of certain parcels of real estate, found in the succession of the said Elizabeth Retaud.

The only party in interest, who interposed an objection to the partition, was Guillaume Retaud, acting as the natural tutor of his minor child, and for himself as entitled to the usufruct of the property, to be divided under a clause in the marriage contract between the deceased Elizabeth and himself.

He filed in Court exceptions to the plaintiffs' action, which, after argument of counsel, were overruled, and he subsequently filed an answer, in which reserving the benefit of his exceptions, he claimed the usufruct of the whole of the estate of his deceased wife, and opposed a partial partition, on the ground that the sale of real estate must be made at a great sacrifice; whereas, if the estate were liquidated it would be easy to effect a partition in kind, as the eventual share of each heir would then be known.

On the merits, the District Court decreed a partition of the property by *licitation*, and one-seventh part of the proceeds of the sale was ordered to be delivered to Retaud, as usufructuary, on his furnishing bond and security according to law. From this judgment Retaud, acting as tutor, and in his individual capacity, and Louis Dupurres, under-tutor, have appealed.

The grounds of Retaud's exceptions were in substance :

1. That a partial partition of a succession is unknown to our law, and if it can be ordered, it can only be done by reason of some extraordinary circumstances and peculiar urgency, of which the petition fails to make any mention.

Westholtz, Widow of David Smith, v. Westholtz.

2. That the succession is still under administration, and that the heirs have not been put in possession, and that the rights of Guillaume Retaud, as universal usufructuary under the marriage contract with the deceased, ascertained or determined, and that the litigation pending between said Retaud and the administrator in the Sixth District Court, and the appeal therefrom, constitutes a bar to this action.

3. That the under-tutor of Retaud's minor daughter is a necessary party to this suit, and also the administrator to the succession.

4. That *quoad* the minor heirs of the deceased a family meeting is required to support the demand for a partial partition.

It is only necessary to examine one of the grounds of Retaud's exception, which is, that a partition of property found in a succession and under administration, cannot be provoked by the heirs.

It is unquestionably the legal right of the heirs of a deceased person to claim the partition of property inherited by them, and it is not necessary that the co-heirs or the party commencing the action should be in actual possession of the succession or of the thing to be divided. C. C. 1243. But it is, nevertheless, irregular, that heirs, some of whom are beneficiary, who are only entitled to the residuum of a succession, should interfere with the administration, and take the property out of the administrator's possession, until all the debts and charges of the succession are paid, and the final account of administration homologated. It is impossible to ascertain from the mortuaria of the succession on file in the suit what is the condition of it; and, although from the fact that the administratrix, but in her own name only, is the plaintiff in the partition suit, it is probable that the incumbrances interpose no obstacle, still the presumption is not a legal one, and is not entitled to any weight.

The heir, who makes opposition, has an interest in having the succession liquidated according to law, and his exception therefore, must be sustained.

It is therefore ordered that the judgment be reversed, and the suit be dismissed at the costs of the plaintiff and appellee.

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No. 1386.—T. C. TWICHELL v. BERNARD AVEGNO.

The plaintiff died while the suit was pending in the lower Court. The widow, in her own right, and as tutrix to her minor child, and the other children as heirs, were made parties to the suit, and judgment was rendered in their favor. Defendant appeals, and gives bond in favor of the widow in her own right, and as tutrix of her minor children, naming not only the minors but those of age: *Held*—That the children of age were not made parties to the appeal.

The Supreme Court will take no notice of documents not making a part of the record of appeal.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.* Cooley & Phillips, for plaintiff and appellee. Budd & Murphy, for defendant and appellant.

LABAUVE, J. This case is before us on a motion to dismiss the appeal on the ground that all the plaintiffs and appellees are not made parties to the appeal, the bond not being given in favor of all of them.

Twichell v. Avegno.

The plaintiff having departed this life while the case was pending below, his widow and heirs were made parties, and the judgment rendered in their favor as follows:

The defendant was decreed to pay to Mrs. L. A. Twichell, in her own right and as natural tutrix of her minor child, Jenny B. Twichell, Henry T. Twichell and Benjamin S. Twichell, and Irine T. Twichell, and her husband, Thos. J. Poole, legal heirs of plaintiff.

The bond is in favor of Mrs. L. A. Twichell, in her own right, and as natural tutrix of her minor children, J. B. Twichell, Henry T. Twichell and B. S. Twichell, and to I. T. Twichell and her husband, Thos. J. Poole.

The pleadings show that Mrs. L. A. Twichell acts for herself, and as natural tutrix to one of her children; the others are of age, and act for themselves. The question arises: Is the bond given in that form, good in favor of the parties of age, although executed in favor of one as their tutor, shown not to be such by the record?

We believe that the bond is not in favor of the appellees, who are of age and represented as minors in this bond, which is made to a person in a capacity that does not and cannot exist.

The appellant contends that he has been misled by a copy of the judgment, and which he has annexed to the record. We can take no notice of documents not making part of the record.

The motion must prevail.

It is ordered that the appeal be dismissed, at appellant's costs.

No. 894.—JOHN A. STEPHENSON *v.* WM. S. MOUNT AND CITY BANK OF  
NEW ORLEANS.

Plaintiff received a letter informing him that a draft drawn by the steamboat *Magnolia* for \$1,200, was placed in the City Bank of New Orleans for collection; being the agent of the boat, he immediately went and paid the draft, and took it up on the same day the holder called, and the clerk of the bank paid him the money, charging no commissions and making no entries of the transaction in the books of the bank. Plaintiff afterwards learned that the letter and the draft were both forgeries: *Held*—That the action of the plaintiff relieved the bank from any liability which may have attached for receiving what was not due.

**A**PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*Roselius & Philips*, for plaintiff and appellant. *John Finney*, for defendants and appellees.

**HOWELL, J.** This is an action to recover back the amount of a forged draft, deposited, it is alleged, in the City Bank for collection, and paid by plaintiff, for the credit of the acceptor, on his faith in the representations of said bank, as holder, of its genuineness. The answer, besides a general denial, sets forth the circumstances of the transaction, and the averments that defendants were strangers to the bill, that without any notice from them plaintiff voluntarily came forward and paid it, and that they had no intimation, for weeks after they paid over the amount to the holder, that it was a forgery.

Judgment was rendered in favor of defendants, and plaintiff appealed.

It appears, that on the 23d August, 1865, a draft purporting to be drawn by the clerk on, and accepted by the captain of the steamer *Magnolia*, of which plaintiff was the agent, for \$1,200, payable on that day at



Stephenson v. Mount et al.

the City Bank of New Orleans, was left by a stranger at said bank, with the instructions that, if no one called to pay it before three o'clock, it should be sent to a notary for protest; in about ten minutes another person called, asked for the draft, describing it, and paid it; in about an hour thereafter the party who had left the bill returned, and the money was handed to him; no entry of the transaction was made in the books of defendants; no stamp, according to custom, or endorsement, was put by them on the bill, which had been laid on a desk until it was called for and paid, and then the money placed in the same way until called for, and taken by the person, who left the bill. About three weeks after this, plaintiff called with the bill and a letter, addressed to him by the clerk of said steamer, requesting him to protest said bill, and stated that the receipt of this letter had caused him to send and pay the bill; but he had discovered both to be forgeries.

Under the circumstances, we think the action of plaintiff relieved defendants from any liability, which may have attached for receiving what was not due. They were passive in the matter, and his conduct in voluntarily coming forward, asking for, describing and paying the bill, was an assurance to them that every thing was right, and not having any interest in the bill, they were thereby warranted in paying over to the real holder.

Judgment affirmed, with costs.

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No. 1155.—JEAN MARIE TUPEY *v.* LAFITTE AND DEFFARGE.

Where a judgment is rendered against the members of a commercial firm *in solido*, and one member of the firm alone appeals the other members must be made parties thereto. It is immaterial when a motion is made to dismiss an appeal for want of proper parties, as, for that cause, it will be *ex officio* noticed by the Court.

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J. C. E. Schmidt*, for plaintiff and appellee. *A. S. Herron*, for defendants and appellants.

LSLEY, J. The appellee moves to dismiss the appeal in this case, because one of the defendants in the above-entitled suit, who is sued and condemned *in solido* as a commercial partner, is not made a party to the appeal by citation or otherwise, nor is any appeal bond executed in his favor. We held in *Saux v. Lefevre & Co.*, 12 An. 757, that "an appeal from a judgment against the two members of a commercial firm *in solido*, taken by one of the partners only, must be dismissed because the other partner against whom the judgment was rendered should have been made a party to the appeal, he having an interest in maintaining the judgment to secure his recourse against the appellant for his portion of the debt.

The motion is resisted by the appellant, because it comes too late; but we have decided in *Swearingen v. McDaniel*, 12 Rob. 205; *Succession of Perry*, 4 An. 577; *Robert v. Ride*, 11 An. 410; *Simmons v. His Creditors*, 12 An. 755, and in 12 An. 774 and 801, that it is immaterial when the motion to dismiss an appeal for want of proper parties is filed, as, for that cause, it will be *ex officio* noticed by the Court.

It is therefore ordered, that the appeal be dismissed at the costs of the appellant.

## No. 502.—H. GEISEK v. THE CRESCENT MUTUAL INSURANCE COMPANY.

An Insurance Company is liable on a fire insurance policy for damages done to goods by water used in saving them from destruction by fire.

**A**PPEAL from the Second District Court of New Orleans, *Whitaker, J. Cutler & Thomas, J. Henderson, Jr., and James Fuller*, for plaintiff and appellee. *J. Ad. Rozier*, for defendant and appellant.

HYMAN, C. J. Plaintiff sued defendant on its policy of insurance against fire for \$3,000 damages to plaintiff's stock of boots, shoes, etc., resulting from a fire.

The District Judge rendered judgment in favor of plaintiff and against defendant for \$1,350, with interest.

The defendant has appealed from the judgment.

The defendant, in answer, admitted that it had insured the plaintiff's stock of boots, shoes, trunks, etc., in his store, for \$3,000.

The plaintiff's store was in the lower story of a house on Poydras street, in New Orleans.

The upper story of the house caught on fire, and the goods of plaintiff were damaged by the throwing of water on the house, in the attempt to extinguish the fire.

The upper story of the house was burnt down by the fire, and the goods of plaintiff, which were insured by defendant, would have been destroyed by the fire unless the water had been thrown on the house to extinguish it.

The defendant is bound by the contract of insurance to indemnify plaintiff for damages done to his goods by water, and in saving them from destruction by fire.

The District Judge placed no reliance in the evidence of the two witnesses, who testified as to the quantity of goods plaintiff had in his store, and as to their value before they were damaged, principally because he was of opinion that they, the witnesses, differed in their estimate of the value of the goods immediately after the fire, and at the time they gave their testimony in the case.

The Judge was mistaken, as regards the statements of the two witnesses.

They made no estimate of the value of the goods immediately after the fire. They then made a statement, not of what was the value of the goods, but what the goods actually cost the plaintiff. On the trial they testified as to what was the market value of the goods.

We do not think that the two witnesses are not to be believed, because they could not state in exact number, the boots, shoes, and ladies slippers that were damaged, or were in plaintiff's store when the fire occurred.

They were the employes of plaintiff; they worked daily in his store, and knew well the stock of goods that plaintiff had therein.

We see nothing in the record that causes us to doubt the veracity of these witnesses. No attempt has been made to prove that they are not credible witnesses.

*Geisek v. The Crescent Mutual Insurance Company.*

The evidence satisfies us that plaintiff had more than three thousand seven hundred dollars worth of goods in his store, and that his goods therein were damaged to the amount claimed by him.

Plaintiff has, in his answer to the appeal, asked that the judgment of the District Court be so amended as to allow him judgment against defendant for \$3,000, with legal interest thereon from judicial demand.

It is ordered, adjudged and decreed, that the judgment of the District Court be so amended that the plaintiff recover of the defendant the sum of three thousand dollars, with the legal interest thereon from 23d day of October, 1862, till paid, and the costs of suit, and that the judgment of the District Court thus amended be affirmed.

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No. 921.—THOMAS VOWELL *v.* THE METAIRIE ASSOCIATION.

Plaintiff was employed in 1860 as Superintendent of the Metairie Race Course, at a fixed salary; in May, 1862, most of the officers of the Association left the city, leaving plaintiff in charge of the grounds: *Held*—That he is entitled to his salary until the grounds were taken under full and absolute control by the military forces, in November, 1864.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.* *Geo. L. Bright*, for plaintiff and appellant. *Ogden & Claiborne*, for defendant and appellee.

HOWELL, J. This is an action on an account for wages and disbursements, as superintendent of the Metairie Race Course, from January 15th, 1862, to November 22d, 1865. Besides the general denial, the defendants specially deny that plaintiff was ever superintendent; aver that there was no need of one after April 1862, the premises being occupied by the military; deny any contract with plaintiff, and claim in reconvention rent of the dwelling occupied by plaintiff from January, 1862, to date of filing the answer, and the price of several cisterns taken by him.

Judgment was rendered in favor of plaintiff for a part of his demand, and he appealed. Defendants join in the appeal, and ask a judgment in their favor.

It is shown that plaintiff was employed as superintendent in 1860, at a salary of \$2,500 per annum, with the use of the dwelling and garden free of rent; that his duties were to keep the track in order, prepare it for the races, have general care of the premises, receive entrance moneys and make necessary disbursements in the performance of his duties; that he continued regularly in such employment until the arrival here of the national forces, about the first of May, 1862, when most of the officers of the Association left the city, leaving him on the premises; that in June or July of that year, one of the officers instructed him to remain and protect the property as long as he could, nothing being said as to compensation; that in September following, the grounds were taken as a camp by some of the military forces, but not thus occupied constantly; that plaintiff remained until November, 1865, and did what he could in

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protecting the property, in which he succeeded only in saving the dwelling and fences around it, and some movables sold by him; that on 23d November, 1864, by a military order, seventeen-twentieths of the stock of the Association were declared confiscated, and plaintiff put in charge of the whole property, as keeper, by the military authorities, and ordered to account to them; his services to be paid for by the chief quartermaster; that on 22d November, 1865, two days after his letter to plaintiff, D. F. Kenner was notified by the commanding general, that the Metairie Race Course was still in the possession of the military, and that while such possession continued the Association would not be permitted to exercise any acts of ownership over it.

From this evidence we conclude that plaintiff was in the employment of the Association until 23d November, 1864, when the military took control, the national troops having been occasionally camped on the grounds, as the rebel forces had been previously. There being no evidence as to compensation, except the annual salary proven, we must allow that sum, making \$7,108 77 for the whole period; during which time he received \$3,203 28, which must be deducted, leaving a balance due him of \$3,905 49.

His charges for disbursements are not sustained by the evidence.

It is therefore ordered, that the judgment appealed from be amended so that plaintiff recover of the defendant, the Metairie Association, the sum of \$3,908 49 (instead of \$1,354 10) with legal interest, from 23d November, 1864, affirmed in other respects, with costs.

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No. 933.—R. H. COLLINS v. G. SABATIER.

Default is unnecessary to enable the holder of an accepted draft to recover interest thereon from the time it becomes due.

Where a party accepts negotiable paper, payable at no particular place, he puts it out of his power to make tender of payment, and thereby deprives himself of the right to stop interest.

**A**PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*W. W. Handlin*, for plaintiff and appellee. *A. Grima*, for defendant and appellant.

HYMAN, C. J. Plaintiff sued defendant as the acceptor of a draft, to recover judgment against him for its amount, with five per cent. interest, from its maturity.

Defendant denied that he owed the interest, because of his enquiry to find the draft when it became due, for the purpose of paying it.

The act to regulate the rate of interest, passed in 1855, (p. 352) provides that all debts shall have interest at the rate of five per cent. from the time they become due, unless otherwise stipulated.

By this law no default is necessary to enable the creditor to receive interest of five per cent. on a claim for money from the time it is payable when there is no stipulation for interest.

Defendant, by accepting negotiable paper payable at no particular place, put it out of his power to make a tender of payment to the owner

at its maturity, for by presentation only could it be known to him who was the owner.

His own act deprived him of the rights of stopping interest at the time the draft became due.

The District Judge rendered judgment in favor of the plaintiff, and against the defendant for the amount of the draft, with interest at the rate of five per cent. from the maturity of the draft till paid, and cost of suit.

Let the judgment of the District Court be affirmed; and let the defendant, who is appellant, pay the cost of appeal.

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No. 993.—CHARLES D. MILLER *v.* SCHNEIDER & ZUBERBIER.

Factors cannot pledge or give in payment of their own debts, property entrusted to them to be disposed of for their principal.

Plaintiff deposited brandy with Campbell & Bisland, retail dealers, for sale; Campbell & Bisland transferred the brandy to defendants on account of their own indebtedness; afterwards, and after being called upon in the interest of plaintiff, by his agent, the factors entered the account on their books as a cash transaction with defendants: *Held*—That the transaction was a *datation en payment*, and not a sale, and that defendants are liable to plaintiff.

**A**PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*E. W. Huntington*, for plaintiff and appellee. *Durant & Hornor*,  
 for defendants and appellants.

**TALLAFERRO, J.** The plaintiff placed in the hands of Campbell & Bisland, retail grocers, to be sold by them on his account, five casks of brandy, for which they gave their receipt, which reads as follows:

"Received, New Orleans, April 18th, 1865, from Mr. Chs. D. Miller, five casks brandy, to be sold for three dollars per gallon, or for more, if it can be realized, or subject to his order.

(Signed)

CAMPBELL & BISLAND,  
 pp. STAFFORD."

Campbell & Bisland, being indebted to the defendants, transferred the brandy to them.

The plaintiff brings this suit against the defendants to recover the brandy, or its value, placed by him at \$637 50. He also prays judgment besides for legal interest from judicial demand.

The defendants put in a general denial. The plaintiff obtained judgment as prayed for, and the defendants have appealed.

The leading question in the case is, did Campbell & Bisland transfer of the property to Schneider & Zuberbier constitute a sale? Campbell & Bisland *quoad* this transaction were factors; and factors cannot pledge or give in payment of their own debts property entrusted to them to be disposed of for their principals. 1 An. p. 7.

There was evidently an effort to mystify the character of the act by which this lot of brandy passed from the custody of Campbell & Bisland into the possession of the defendants. An "ominous conjecture" is cast upon the fairness of the transaction. Campbell & Bisland owed Schneider & Zuberbier a thousand dollars. A clerk of Campbell & Bisland testified that when the brandy was sent to the defendants they were



Miller v. Schneider &amp; Zuberbieir.

charged with it, and that afterwards, he was instructed to enter it as a cash transaction. This was some time in June, 1865. In August afterwards, Campbell & Bisland went into insolvency. Another clerk of that house testified that the brandy was sold to defendants, and that he made out the bills; four casks having been sold at one time, and one cask at another time.

Massey, a witness and agent of the plaintiff, testified that on coming from Matamoras to New Orleans, he called on Campbell & Bisland, and from the tenor of the conversation he speaks of having with one of the clerks, it seems that the transfer of the brandy to the defendants was not communicated to him. He states that a few days afterwards, he ascertained that the brandy had been sold to Schneider & Zuberbieir, the defendants. That upon advice of counsel, he went immediately to one of the partners of that firm, and notified him not to pay Campbell & Bisland for the brandy, and received for answer that they had entered a credit on their books for it in favor of Campbell & Bisland. The witness states that this occurred between the 18th and 24th of June. Afterwards, on his return to New Orleans, he states that in an interview with the members of the firm (meaning the defendants) the one with whom he had previously communicated, denied having told witness that the firm had credited Campbell & Bisland with the proceeds of the brandy, and then asserted that he had told witness they had paid Campbell & Bisland for it.

The bills of sale of the brandy are dated the one on the 21st June, and the other on the 23d June.

A witness, on behalf of the defendants, swore that he saw the bills paid in money; that they were paid by the bookkeeper of Schneider & Zuberbieir. The testimony of this witness, upon the whole, is of that character that it cannot be considered entirely reliable. One of the clerks of Campbell & Bisland, who testified, being recalled, said he believed the call of Massey, the agent, upon Campbell & Bisland on the subject of the brandy, caused them to give instructions to witness to make the entries on the books; meaning clearly the entry in relation to passing the plaintiff's property over to defendants "as a cash transaction."

A careful perusal of the evidence leaves no doubt with us, that the transaction was a *dation en payment*, and not a sale.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

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No. 988.—S. M. HART v. S. ADLER.

The Court will not give judgment for the return of the price paid for goods, on account of the non-delivery by defendant, until plaintiff seeks to annul the contract for non-compliance by the defendant with its provisions.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J.*  
*P. H. Morgan and John H. New*, for plaintiff and appellee. *Edward Phillips*, for defendant and appellant.

Hart v. Adler.

HYMAN, C. J. Plaintiff instituted suit to recover from defendant the price that he paid to defendant for five bales of cotton, sold by defendant to him on the plantation of D. G. Kelbourne.

Judgment was rendered against defendant, and he has appealed.

A bill of exception was taken by defendant to the ruling of the Court, admitting the testimony of J. F. Hayden taken under commission.

The ground of objection to the admissibility of the testimony, was that Hayden was an interested witness.

Hayden's testimony disclosed that he was the agent of plaintiff in buying the cotton from defendant; that defendant knew that he was acting for plaintiff; that he was interested at the time of the purchase of the cotton, but that when he gave his evidence, he was not interested directly or indirectly in the result of this suit.

What his interest was we are left to conjecture; but it is not material what that interest was, since it had ceased, and without being interested he was a competent witness, and the Court properly ruled in admitting his testimony.

The agent taking a receipt in his own name for money expended, would not disqualify him as a witness for his principal.

And their objection was made to Hayden's testimony, on the ground that his evidence is inadmissible under the pleadings, because of contradiction to the allegations of plaintiff's petition.

The reply to this objection is, that we do not discover that any part of his evidence contradicts plaintiff's allegations.

There is no evidence that defendant had not the cotton on Kelbourne's plantation, neither is there proof that defendant has been put in default for the delivery of the cotton, and default is a prerequisite to the right of plaintiff to recover the price paid by him.

Until plaintiff seeks to annul the contract for non-compliance of defendant with the contract, on being put in default, we cannot restore to him the price. See 9 Robinson's Reports 52; 2 An. Rep. 392; Civil Code, 1906.

It is decreed, that the judgment in this case be reversed, and that there be judgment against the plaintiff and in favor of the defendant, as in case of nonsuit, with costs in both courts.

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No. 960.—A. M. E. CHURCH v. N. DURU et als.

Where the building committee of a corporation sell the corporate property to the builder, in liquidation of his claim, without special authority so to do, the sale will be declared null. The undertaker will, however, be allowed what remained unpaid on his building contract, and for improvements by him made; and will be charged the rents by him received.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*J. J. E. Planchard*, for plaintiff. *C. Redmond*, for defendant.

LABAUVE, J. This action is brought by the African Methodist Episcopal Church, incorporated under the act of 1847, to annul a sale (alleged to be fraudulent) of a lot of ground belonging to them, claiming also

\$3,400 received by the defendants from the city, for rents of the lot and house, and \$749 for movables disposed of by N. Duru, and \$1,216 rent and hire of house for their religious worship, etc.

The answer is in the nature of a general denial.

The District Court, having heard the evidence, annulled the sale, and gave judgment for plaintiffs for \$2,335 against N. Duru.

The Court gave also judgment against plaintiffs in favor of said defendant, Nicholas Duru, for the sum of \$2,500, as builder, and for a further sum of \$1,500.

Nicholas Duru appealed, but he has made no appearance in this Court to point out any error to his prejudice.

After the organization of said corporation, the lot in dispute was purchased to build the church thereupon; a building committee was appointed to contract for the erection of a suitable building. The defendant, Nicholas Duru, took the contract for \$2,755, payable \$1,200 on delivery of the key, and the balance on different times of credit. The building having been completed and received, the said undertaker acknowledged to have received on account \$591, and the building committee gave notes for the whole balance.

On the 29th of April, 1857, the said building committee and said undertaker, Nicholas Duru, declared in a public act, that said corporation was duly indebted unto the said Duru in the sum of \$2,500 for said work; that said Duru had already commenced judicial proceedings to enforce payment, and the said committee made a sale *à réméré*, to said Nicholas Duru in payment of said sum of said lot and all the buildings and improvements thereon; the said vendors reserving the right of redeeming said property within four years from the date of said act, on paying to said Duru the said amount of \$2,500.

Nothing in the record shows that this committee was authorized to pass a sale.

The evidence shows that Duru received for rent of said property \$2,335, and that he also made improvements on the same to the value of \$1,500. The sale being annulled, and the corporation taking back the property, with all the improvements, it is but just that the said corporation should pay him the \$2,500, in payment of which he had taken the said property, and also the value of improvements put up by him while he possessed the property.

Upon the whole, we are of opinion that the judgment of the District Court is correct.

Plaintiffs and appellees' counsel asks, in his printed brief, that the judgment be amended so as to strike out the \$2,500, and the \$1,500 granted by the lower Court to the defendant and appellant, but no answer has been filed praying for such amendment; a brief is not an answer; it makes no part of the pleadings. C. P. Art. 890.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, with costs.

## No. 970.—HOMER KELLOGG et als., Owners of Steamboat Una, v. STEAMBOAT T. D. HINE AND OWNERS.

No damage can be recovered by plaintiff on account of the collision of steamboats, if, by his fault, negligence or mismanagement, he has contributed to the collision.  
If the collision be the result of accident, the one in fault must bear the whole loss.

**A**PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. Bentick Egan*, for plaintiffs and appellants. *Harrison & Hunton*, for defendants and appellees.

LSLEY, J. A collision having occurred on the 4th of July, 1865, between the steamboats Una and T. D. Hine, the plaintiffs have sued to recover from the defendants damages, which it is alleged in the petition was occasioned by the carelessness, neglect and want of skill, in the direction and management of the steamboat T. D. Hine.

The answer is in effect a general denial, and there is also a demand in reconvention, set up by the defendants.

The Court below attributed the collision to the want of skill, and the non-observance of caution on the part of the officers of the Una, who could, as the Court says, have prevented the collision; and judgment was rendered in general terms in favor of the defendants, thus substantially settling all the points in controversy. *Anderson v. Dunn*, 17 La. 172. And from this judgment the plaintiff has appealed.

The collision took place on Red River, under the following circumstances :

Owing to an intervening point of land, the two boats were invisible to each other until they were three hundred yards only apart.

When the pilot of the Una first perceived the Hine, he discovered there was something wrong with her, and the headway of the Una should then have been stopped; but, instead of doing this, he continued his course unchecked, until he got within fifty or sixty yards above the Hine, when, for the first and only time, he signalled for the starboard, and, as he says, "worked slow perhaps for half a minute, and then put on steam to try and pass the Hine as she was swinging across the river." This was certainly a very hazardous, and, as it turned out, a somewhat disastrous undertaking.

A skilful pilot might, by the use of precautionary means, and observing rules established by law, have avoided the disaster. The engineer of the Hine gives this version of the event: he says, "the Hine had become unmanageable; her tiller and bell-rope communicating between the pilot and the engineer were both broken, and the boat was swinging out, about square across the river, so that the engineers could not tell what they were doing. The Hine had run up and stopped under the point, but not being able to work her wheel, to keep her bow on shore, she swung out and the Una attempting to run by, came within a few feet of doing so; but the boats came together."

The position occupied by the Hine in the river, was accidental and unavoidable; she was helpless, and there being no means of

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communicating between the pilot and the engineers, accounts for her giving no signal. It has been frequently decided in our courts that no damages can be recovered in cases of collision, if the plaintiff has by his fault, negligence or mismanagement, contributed to the collision. He must, himself, be free of fault. This is the settled jurisprudence of this State. *Myers v. Perry*, 1 An. 372; *Carlisle v. Holton*, 3 An. 48; *Murphy v. Diamond*, 3 An. 441; *Reese & Segar v. Steamboat Mary Toboy*, 6 An. 71; *Edgell, Mulford & Co. v. Barataria and Lafourche Co.*, 6 An. 425; *Quarrier v. Richards*, 7 An. 277; *Dunn & Sacket v. McConel*, 11 An. 325. And particularly if a collision be the result of accident, the one in fault must bear the whole loss. *Brickle v. Frisby*, 2 Rob. 205; *Virginia Insurance Co. v. McClendon*, 11 La. 115.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

No. 852.—BERNARD CAPELLA v. G. R. CARRADINE, Sheriff.

A person may be compelled to pay a license tax in any parish where he is carrying on a profession or calling, whether it be his domicile or not, unless he can show payment in the parish of his domicile. A person cannot be subjected to pay a license tax under the law of March 15th, 1865, on account of acts done before the passage of the law.

**A**PPEAL from the District Court, Parish of St. Tammany, *Jones, J.*  
*D. N. Hennen*, for plaintiff and appellant. *G. H. Penn*, for defendant and appellee.

LABAUVE, J. Bernard Capella, of New Orleans, states in his petition that G. R. Carradine, sheriff of the parish of St. Tammany, has demanded of petitioner the sum of four hundred dollars, as State and parish taxes, due by petitioner for peddling and hawking goods, wares and groceries, on 1st February, 1865, from the schooners *Mary Magdeline* and *Desirée*, to wit: \$100 for each schooner for the State, and \$100 for each schooner for the parish of St. Tammany, and said Carradine has seized both of said schooners, *Mary Magdeline* and *Desirée*, their tackle, apparel and furniture, to pay said sum of \$400.

And he alleges, in substance, that the said Carradine is not duly appointed sheriff, and has no authority to collect said taxes; that said pretended taxes have never been listed, nor has any legal assessments thereof been previously made; that petitioner is not legally subject to pay any license or tax, State or parish; that if petitioner is taxable at all, it is in the parish of Orleans, where he has domicile; that he has never sold any other produce in the parish of St. Tammany, but such as was the growth of the United States; that the laws, under which said Carradine is proceeding, of April 4th, 1865, is prospective and not retroactive.

He prayed, and obtained an injunction.

The defendant, Carradine, answered by a general denial; that he has acted in the premises in the discharge of his duties as collector of the



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State and parish taxes or license for the year ending 31st December, 1865, in pursuance of law and ordinances of the police jury of the parish of St. Tammany, in reference to revenue and manner of collecting the same; that plaintiff during the year 1865, in the State of Louisiana and parish of St. Tammany, has been carrying on the occupation of a *peddler and hawker*, in carrying goods, wares and merchandise, and groceries for sale, in the schooner *Mary Magdeline* and *Désérée*, without obtaining licenses and paying the tax thereon.

He prays that the injunction be dissolved, with damages, as attorney's fees, general relief and costs.

The Court below, after having heard the evidence, dissolved the injunction with damages and costs, according to the verdict of the jury to whom the case was submitted.

The plaintiff appealed from that judgment.

On the trial of the case below before the jury, plaintiff's counsel asked the Court to charge the jury: that the only authority for the sheriff to make the seizure, was an assessment roll made in conformity to law, on which plaintiff should have been assessed or listed for the tax or license, for the profession of hawker and peddler; that a party could only be assessed legally on the profession he exercised, in the parish of his domicile, and where he resides; that by law the sheriff could not make a seizure for any license tax or dues until thirty days after the notice given by the sheriff of said tax being due; all which charges the Court refused to make, but charged that the provisions of law referred to by plaintiff did not refer to licenses due on professions, but to tax on lands and other property, and that a person might be compelled by seizure to pay license in any parish where he was exercising a profession, whether domiciliated or not, unless he could show payment of a license in his domicile. The plaintiff excepted to the ruling of the Court. We believe the Court decided correctly.

An annual tax is levied and collected:

From each peddler or hawker who peddles or carries goods, wares, merchandise or groceries for sale, through this State, in a boat or other water craft, one hundred dollars. Acts of 1855, p. 504, § 7.

The following admission was made on trial below:

"Plaintiff admits that Carradine is sheriff of the parish of St. Tammany, La., and *ex officio* collector of State and parish taxes and licenses for said parish for the year 1865, and as such duly qualified; that the parish tax for said year is the same as that of the State."

The law contemplates that any one intending to follow a trade, profession and occupation, shall obtain a license, issued under the signature of the auditor. Same act, p. 513, § 51.

The main question in this case, is whether or not the plaintiff, Bernard Capella, was a peddler or hawker, and liable for the parish and State taxes claimed from him by the sheriff of the parish of St. Tammany.

The only testimony that tends to show that Capella was a peddler or hawker in the parish of St. Tammany, is as follows:

"Mr. Gallatus sworn: Knows Capella was domiciliated in New Orleans; had coffee-houses; Capella brought provisions a short time before

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the surrender of the Confederates; brought passes from Federal authorities; shown papers A. B. C., about those dates; the provisions brought by Capella, the prices were generally regulated by the provost marshal; was present in *February*; saw Capella selling goods, both by retail and wholesale; saw him sell to Judge Martin, butter; saw him sell crockery; Capella owned three schooners; saw him selling three or four times. Capt. Jones and Capt. Capella were in partnership, as he learned from both; goods sold were hardware, provisions, coffee, tea, sugar, hams."

The law imposing a tax of one hundred dollars on each peddler or hawker, and under which the sheriff proceeded to seize the schooners on the 19th July, 1865, was approved on the 15th March, 1865; the law then in force and repealed by this act, imposed on each peddler or hawker a tax of only sixty-seven dollars. Revised Statutes, p. 487, § 7.

The testimony does not show that the plaintiff was a peddler or hawker in the parish of St. Tammany, the witness saw him sell goods in *February*, but in what year and where, nothing shows; it might as well have been in New Orleans, or anywhere else, as in the parish of St. Tammany; nor does the testimony indicate that the goods then sold, had any connection with and came from either of the schooners, so as to show that the plaintiff was a peddler or hawker, carrying goods, wares, merchandise or groceries for sale through this State, in a boat or other water craft. But suppose that the goods were actually sold in St. Tammany, in February, 1865, and on board of the schooners, the law enacted in March 15th, 1865, and under which the sheriff has seized the schooners to pay \$400 licenses, did not apply to the case.

Upon the whole, we are of opinion that the sheriff has failed to show that the plaintiff, Capella, was liable to pay the amount claimed of him for licenses.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be annulled and reversed, and it is further adjudged and decreed, that the injunction be perpetuated, and that the defendant and appellee pay costs in both courts.

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No. 985.—W. R. CRANE, Executor, v. A. TRUDEAU et als.

The discharge of an endorser of a note because notice of protest was not properly served, does not release the other endorsers.

The holder is only bound to notify the endorser whom he intends to hold liable.

In relation to third parties and *bona fide* holders, the obligations of accommodation endorsers are co-extensive with those of endorsers of business paper. It would be different if the transferee of a note endorsed, obtained it from the *maker*. In such a case the endorser would be a surety.

Where no privity is shown between the parties to a note, every endorsement, whether accommodation or otherwise, is essentially an original contract, equivalent to a note in favor of the holder.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J.* Durant & Hornor, for plaintiff and appellant. A. Z. Trudeau, for defendants and appellees.

LSLEY, J. Two of the defendants, A. Trudeau and J. Trudeau, being

sued *in solido*, the first as payee and endorser, and the last as second endorser, set up separate defences.

The defence is the same to this extent—that each endorser is discharged from liability for the note sued on, for want of legal notice of protest, and because time was given to the maker without the consent of the endorsers.

The supplemental answer of J. Trudeau, further pleads his discharge from liability as endorser, because the plaintiff, the holder of the note, failed to give legal notice of protest to the previous endorser; that the note is *accommodation* paper, and that his liability therein is that of a surety, and that he is also discharged, as by the wilful negligence and laches of the holder, he has lost his recourse against the first endorser.

The Court below rendered judgment in favor of both defendants, because A. Trudeau had not been notified of the non-payment of the note according to law, and because the rights of J. Trudeau against A. Trudeau, the first endorser, had not been preserved by the plaintiff unimpaired.

The plaintiff has appealed.

Another ground is urged in this Court for the discharge of James Trudeau. It is that the protest shows that the demand was made at the *Louisiana Bank*, while the note was payable at the *Louisiana State Bank*.

This is a clerical error, which explains itself, for the notary in his protest says that payment of the note was demanded by presentation of it to the proper officer at the *Louisiana Bank* in this city, *where the same is made payable*, and the note itself attached to the protest shows that the words *Louisiana Bank* evidently meant *Louisiana State Bank*.

The first endorser resided in the parish of Jefferson, and not in Baton Rouge, at which latter place only, notice of protest was sent to him. He was therefore discharged. But his discharge did not release the second endorser, who, on the same day of the protest, was served personally with a legal notice thereof. If he wished to secure his recourse against the previous endorser, he should have given him notice. The holder was only bound to notify the endorser whom he intended to hold liable. Hennen's Dig. vol. 6, p. 197, sec. 2. In relation to third persons and *bona fide* holders, the obligations of accommodation endorsers, are co-extensive with those of endorsers of business paper. 7 N. S., 12, 369; 7 N. S., 499. It would be different if the transferee of a note endorsed, gets it from the maker. In such a case the endorser would be a surety.

The plaintiff in this suit is not shown to have discounted the note for the benefit of the maker. The only privity in this case shown, is between the last endorser and the plaintiff, and every endorsement, accommodation or otherwise, is essentially an original contract, equivalent to a new note or bill in favor of the holder: *Dupré v. Richards*, 11 Rob. 497; *Jas. Trabue & Co. v. R. H. Short & Co.*, 18 An. 258; Story on Bills, sections 331, 334, Notes, § 155.

It is therefore ordered, adjudged and decreed, that so far as the judgment of the District Court is in favor of J. Trudeau and against the plaintiff, that it be annulled, avoided and reversed; and, it is further ordered, adjudged and decreed, that judgment be and it is hereby rendered in favor of the plaintiff, William R. Crane, dative testamentary ex-

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centor of the succession of James Ogilvie and against James Trudeau, one of the defendants, for the sum of sixteen hundred and thirty-one dollars and sixty cents, with interest at the rate of eight per cent. per annum, from the 4th February, 1862, till paid, five dollars sixty-five cents costs of protest, and costs of suit in both courts; and that the judgment of the said District Court in favor of A. Trudeau and against the said plaintiff, Wm. R. Crane in his said capacity, be and the same is hereby affirmed; the costs of appeal in the suit against A. Trudeau to be paid by the plaintiff and appellant.

No. 1317.—L. S. AUSTIN, Tutor, *v.* MARY SANDEL, Administratrix.

Where the consideration of a promissory note is shown to be the sale of an African slave, payment cannot be judicially enforced.

Property in slaves being prohibited by the sovereign power, all contracts based on such property are stricken with nullity.

Courts of justice, which act only upon and under the law, cannot give vitality to laws which have become, by paramount authority, inoperative and void.

The doctrine in the case of *Wainwright v. Bridges*, (ante page 234) reaffirmed.

**A**PPEAL from the District Court, Parish of East Feliciana, *Posey, J.*  
*McVea & Hunter*, for plaintiff and appellee. *J. H. Muse*, for defendant and appellant.

*Reporter.*—There were several cases on appeal to the Supreme Court involving the same plea in defence, viz: want or failure of consideration, where the contract was either shown or admitted to have grown out of the sale of slaves which are sought to be enforced after emancipation. The case of *Wainwright v. Bridges*, (ante page 234) was first taken up and decided by the Court. In that case, there were no briefs or arguments of counsel filed on either side, but the Judges had access to the briefs filed in the other cases, to aid them in making a decision on the points raised by the record. In all the cases subsequently decided involving the same points, no elaborate opinions were prepared by the Judges; they simply reaffirming the doctrines and principles enunciated in the *Wainwright* case. In this case I publish the briefs of counsel on both sides, which were consulted by the Court in the other cases.

*Brief of McVea & Hunter, for plaintiff and appellee.*—The defence to this suit, brought on a note in the ordinary commercial form, and received by the tutor for the minor he represents, before its maturity, is:

1. Prescription of five years.

2. Failure of consideration for which the note was given, by act of the sovereign authority, State and Federal, emancipating the slave.

Upon the first, we will refer the Court to the evidence in regard to the state of affairs in the parish in which both parties were living. It presents, if anything, a stronger case for the application of the maxim "*inter arma silent leges*," than the case we consider as justly deciding this question (*W. D. Smith v. C. D. Stewart*), recently decided.

Mr. Hardee says: "During the years 1863 and 1864, there were constant and continuous collisions between the two opposing forces in this parish."

"From August, 1862, to the Confederate surrender, this country was under continual military occupation."

In more than one instance there were engagements in the immediate vicinity of the plaintiff's house, situated about fourteen miles from Port Hudson.

It is true that some sort of occasional Courts were held, and at one time there were two Judges for the same district.

Judge Avery, the regularly elected Judge, held his last term of Court in January, 1862; resigned in April, 1863. Judge Smith held a Court in 1864, under a Confederate appointment by Governor Allen. Judge Posey was Judge of this same district during a portion of this very time, and was not able to hold a Court in the section in which the parties lived.

We submit that under these circumstances the plaintiff was not called upon to act upon his claim, and he did so as soon as practicable, and the business of the Court was resumed.

The other ground is equally untenable. While admitting there is no provision of law recognizing this defence, she attempts to place it upon the ground of the equity powers of the Courts.

She ought, in order to urge this defence with any force, first evince a disposition to do equity.

She makes no proposal to account for the services of this slave from the time of the sale in 1858, until the slaves's emancipation, at whatever date it may be held to be fixed.

She does not show that the slave was ever emancipated in her hands. The succession of Sandel may have among its assets, for aught we can gather from the evidence, the proceeds of the sale of this very slave.

*Brief of B. J. Sage, for defendant and appellant.*—This case is one of that large and important class, where debt, evidenced by note or otherwise, is due for slaves which have been emancipated by the supreme authority of the State, in its recent abolition of slavery. I question not the validity of this abolition. It is done; no one expects or endeavors to restore the institution to life; and the only practical questions concerning it, we have now to deal with, are consequential ones.

The term "State" herein used, simply means political society, except where it obviously indicates one of the United States. I evade several disputed points concerning our sovereignty, and the character of the governmental contrivances, we, as a self-governing people have adopted, and assume some fundamental principles which I think will not be controverted, as they have the sanction of the first publicists, and political philosophers of the world.

I shall attempt to sustain the following points:

1. That the political sovereignty, which has acted in the premises, is a moral person, a unity, with an understanding, a will, and a conscience.
2. That sovereignty is identical with justice, and is, in its nature, incapable of injustice.



3. That the contract interfered with, is unsusceptible of division—is *res integra*; and that, in destroying the "cause" of the contract, or a part of the contract, or in discharging a party, the sovereignty *ipso facto* dissolves the whole thing—the *res integra*.

4. That the judiciary cannot enforce what the sovereignty has nullified; and that hence, the defendant is discharged; and it is immaterial whether the plaintiff is bound in warranty or not.

Besides supporting the above points, I shall endeavor to strengthen my conclusions by criticising, and attempting to refute the chief arguments I have seen adduced by attorneys or judges in support the plaintiff's pretensions.

We are a republic; that is, we, as an organized people, govern ourselves. The political sovereignty is ours; and hence the responsibility of doing justice between subjects falls upon us as a commonwealth. And the State is a moral being, possessing understanding, will and conscience; in other words, the capacity and the obligation to do justice; and it must be guided by the principles of morality and equity, in making and enforcing its laws, and in examining and weighing conflicting claims of right, and establishing justice between them.

Justice in our country is justice to one another, for we govern ourselves under the obligations of the social compact which makes us a commonwealth; and all the manifestations of our sovereignty, in making and executing laws, and rendering justice under the laws are *our* acts. And our golden rule must of necessity be, to do to individuals as we would be individually done by.

Not a soul of us would wish to be forced to pay for what had been taken from him against his will.

And it cannot be our intention, as a sovereign, to wrest a negro or any other property from a citizen, and then compel him to pay for the same. Such conduct would do for robbers, but not for men who, as a body, have the faculty and the right to do justice, and who, as individuals, always crave it.

We may state the question nakedly, thus: Shall the defendant be deprived of his property against his will, and prohibited from calling on his warrantor for indemnity, and yet be simultaneously compelled by the same power that has done this, to pay for it? It will be attempted to show that such an idea is abhorrent to law, equity and common sense.

I. My first proposition is, that the sovereignty—that is the soul of the State—which dwells and acts in the organized people, is in its nature a unity, and indivisible—is, in other words, a moral being. As to the authority for this, I need only say that Vattel and all the other great publicists agree on it. This sovereignty manifests itself in legislative, executive and judicial acts, through created or incorporated agencies called governments. Let us personify it as a wise and good man enthroned, and possessing investigative faculties, understanding, will and conscience, attributes, I have affirmed, of the State. See Vattel, p. 14 *et seq.* Would such monarch legislate or decree the destruction of the thing bought, and at the same time, and with the same mind, proceed judicially to compel payment for it? This is so utterly absurd that if the law apparently lead to it, the Courts, according to all rules, must inter-

pret to avoid it, and must let in equity, if indeed Courts can act upon the matter at all, which I aim to disprove.

II. Sovereignty, from its nature, cannot do a wrong, but must act with justice and equity; must be impartial, and treat all citizens as equals. Says Lieber's "Political Ethics," ed. 1839, p. 151: "The fundamental idea of the State is justice—the right which exists between man and man. That which renders the State so great and important is, that it maintains right, protects, and is a continual guard over the individual right of every one; that it demands of no member an obligation on his side alone, but knows of mutual obligations only." Elsewhere, he says: "Justice, in its broadest sense, is the foundation of the State." Says Milton in his "Tenure of Kings and Magistrates": "Justice is the only true sovereign and supreme majesty upon earth." Says Bracton (de Legg. et consuet. Angl., lib. 1. cap. 3.) "Item author justicie est Deus, secundum quod justicia est in Creatore." See also Blackstone, Book 1, p. 40.

We must reflect that the sovereignty in our country, being the political power of all united, must act for all, and alike to all. The community, in acting upon the rights of its members, can make no distinction. It cannot say to one party to a contract: "You shall give up the thing and pay the price," and simultaneously to the other: "Go free." This is the only truthful way to state the matter, for any little (or great) lapse of time between the making and the consummation of the contract by complete performance does not change the principle. It may be stated that the sovereign at the same moment binds one party and discharges the other. The capability of such action cannot be predicated of sovereignty.

The absurdity and mockery of the reply, that the government simply takes private property for public use, or "for works of public utility," and must compensate, will be duly shown.

I take it for granted now, that I have established the absolute unity and indivisibility of sovereignty; and that in the two cases of interference with the contract in question, i. e., in setting the negro free, and in enforcing payment for him, it acts with the same mind and heart; and secondly, that from the nature of sovereignty it can only be just and consistent, treating its subjects with equity, which is equality, and is incapable of discharging one party and coercing the other.

III. The contract in question, with all its stipulations and incidents on both sides is a unity, and must be dealt with by the sovereignty as a whole. It is a commutative and synallagmatic contract, that is to say, "a contract containing mutual covenants," or in which "what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given or promised by the other." C. C. 1761, 1763. See also 1893, showing the unity of the contract, though many obligations spring from it. See also 39 C. P., which declares that it is "of the essence of a synallagmatic contract," "to give rise to two species of direct actions" to enforce the "mutual covenants." Hence not merely the sovereignty, but the Courts must keep in view the whole contract as a unity, *res integra*. Inst. 3. 30. 4. If any essential part, any part deemed a *sine qua non*, had been wanting, the parties would not have agreed to it;

so, if any part be changed, the thing is not their contract. Just what they have agreed upon is the law *inter sese*. C. C. 1895, 1940, 1960. One party gave a negro, whose elements of value, forming the motive and cause of the contract, were that he was sound, sensible, and a slave for life; and the other gave an equivalent or consideration, viz: cash, and notes bearing interest and secured by mortgage. If the supreme legislative power come and repeal a part of that law, the whole becomes *ipso facto* null; and the remaining part of it cannot be enforced, for the sole foundation of that law was the agreement of two wills; and that law itself was what they agreed on as a whole, *res integra*. In other words, if the sovereign interfere, and discharge one of the parties, or destroy the cause or consideration before the mutual obligations of the parties are ended, and before their reciprocal rights of action are extinguished the contract is at an end; for the rule of law, as well as common sense, is, that where the sovereignty intervenes for State reasons, and discharges one party, the contract is dissolved.

I repeat, that where the State annuls any integral part of a contract, or prevents its effectuation, it dissolves the whole thing.

Let us now see how far the English Courts have recognized the principle stated, in reference to the action of their government, which, unlike our governmental contrivances, is the sovereignty. There is no case directly in point, for England recognized slaves as property, and paid for them; but there are many cases involving the principle contended for.

In the case of *Touting et als. v. Hubbard*, 3 B. & P., 296, Lord C. J. Alvanley stated the principle of the various cases to be this: "If a party contract to do a thing he shall be bound to performance, if it legally may be, and is capable of being performed; but when the policy of the State intervenes, and prevents the performance of the contract, the party will be excused. And so if a party who has covenanted not to do something, is directed by act of parliament to do that very thing, he is released from his covenant.

All these English and American cases show the principle to be, that if any unexecuted part of the integral contract become prohibited, all unexecuted parts become null, as do all rights of action springing therefrom. In other words, the contract, as a whole, is dissolved by the State, except as to what has been legally accomplished.

Here is really the principle relieving the defendant, though it seems to have been ignored, and its strength not understood. Principles that belong to different *strata*, so to speak, of political science, are confused. Legislative acts and jurisprudential and moral maxims that prevail under the law, are carried up to regulate the acts of the sovereign who made the law, and is above the law. So that all we hear said about private property being taken for public purposes; about compensation; about the risk falling on the vendee after delivery; and about the warranty of "slave for life," etc., etc., is inapplicable; and we may, without discussing these civil codities, claim the absolute discharge of the defendant, as the result of the sovereign act of dissolving the contract which bound him.

The abolition of slavery is not only the destruction of a great institu-

tion, but it is the annulment of a tenure of property, and neither of these things can be done by ordinary legislative power. Fundamental institutions and tenures, can only be destroyed by the sovereign authority that established them, that of the people; for not only has no power been delegated to any governmental (i. e. vicarious) authority to do so, but such vicarious authority is provided by the sovereignty solely to preserve, protect and defend; not to destroy or impair rights. Hence this matter is above the cognizance of the delegated legislative power, and *a fortiori* above the cognizance of the judicial authority, which can only act upon law; so that neither the warranty (if there be one) nor payment can be enforced.

Every vestage of law which recognized slave tenures has been swept away, and all contracts based upon such tenures, or involving a slave consideration, were swept away, too. A new fundamental law, the law of freedom to all, has been established by the sovereignty, and the creatures of sovereignty can only act upon, and according to the fundamental law the sovereignty has made; that only the paramount authority of the State can interfere with, and change or annul the obligations of the parties legally entered into, and that the ordinary legislative authority of the republic is not capacitated to do so, are ideas fully recognized by the Civil Code itself (1940, 1958.) The sovereignty has acted; and by its subsequent and higher law, abolishing slavery and destroying slave tenures, all laws pertaining to and supporting slavery and slave contracts, are repealed. In other words, it has annulled, as to slavery, "the law of the land, and that which the parties have made for themselves by their contract." (C. C. 1960; see also 1895, 1940, 1958.) These parties cannot make, on any slave basis, any new law for themselves; and they cannot execute such portions of an old one on such basis as remain executory, for if the ordinary legislative authority cannot pass or permit a law upon this subject, surely the ordinary judicial authority cannot execute or enforce one. And this brings up directly the following point, which the above authorities suggest and sustain.

IV. The judiciary, which is a creature and agent of sovereignty, cannot enforce what the sovereignty has nullified; and hence, it is immaterial whether the plaintiff is bound in warranty or not. The Court could not, in any one of the above-cited cases enforce the contract, because a Court can only hold jurisdiction on and conterminate with law; and not only the contract, which is the law between the parties, has perished, but the law which authorized the Courts to take cognizance of, and enforce such contract has been repealed. And as to the rights of action springing out of the contract, they must have perished too; for, says C. P. 39, "it is of the essence of a synallagmatic contract," "to give rise to two species of direct actions." In this case, these actions were—first, that of the plaintiff v. the defendant, *for the price, etc.*; and, second, that of the defendant v. the plaintiff, *for title, etc.* The mother was stricken to death by the sovereign, and the twins died *en ventre sa mère!* Beyond question, the plaintiff's guaranty of slave for life, if it ever existed; his guaranty of title; his guaranty of the vendee's peaceable possession; his guaranty against redhibitory vices; as well as the defendant's obligation to pay the price, all perished with the contract.

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It is no reply to say that there is no warranty, and hence no action of warranty; for if we admit this, the action for the price remains, because, as the Code of Practice, p. 39, declares, "it is of the essence of a synallagmatic contract," "to give rise to it;" so, the contract being dissolved, the plaintiff's right of action is gone, it being only correlative to, and co-existent and commensurate with the obligation he seeks to enforce. The right of action has a necessary relation to the thing purchased, for it is for the price of said thing, and it springs out of the obligation to pay for it. The Court is bound to know, that in this case the obligation is a slave one, for it is of the kernel, and not merely of the husk, that jurisdiction is held, and it is the obligation and not merely the note, which the Court must closely inspect, in order to ascertain whether to hold or decline that jurisdiction.

I conclude, therefore, that the defendant is discharged; not because the plaintiff does not stand to his warranty, but because the Court has nothing on which it can act to execute or enforce.

The reason and philosophy of the principle contended for, is well set forth by Lord Ellenborough, in the case of *Atkinson v. Ritchie*, (10 East, 530.) His lordship, remarking on the proposition, that "in every private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the State is materially involved, said as follows: "That no contract can properly be carried into effect, which was originally made contrary to the provisions of the law, or which being made consistently with the rules of law at the time, has become illegal, in virtue of some subsequent law, are propositions which admit of no doubt. Neither can it be questioned, that if from a change in the political relations and circumstances of this country, with reference to any other; contracts which were fairly and lawfully made at the time, have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his sovereign, and the State of which he is a member; the non-performance of a contract in a State so circumstanced, is not only excusable, but a matter of peremptory duty—an obligation on the part of the subject."

So when, in our country, the State, exercising its sovereign will, with motives satisfactory to itself, abolishes slavery and all its incidents, the laws supporting it, and all contracts based upon it, (that is, "the law of the land, and that which the parties have made for themselves by their contract," C. C. 1960) "become incapable of being any longer carried into effect, without derogating from the clear public duty which" the citizen "owes to his sovereign, and the State of which he is a member;" and the "non-performance of such contract, in a State so circumstanced, is not only excusable, but a matter of peremptory duty—an obligation on the part of the subject. \* \* \* \* \*

1. It is said that the discharge of the defendant would impair the obligation of a contract; and that hence, the Court must hold him to his obligation. For the reasons heretofore stated, this is not an objection which any Court can notice. The sovereign can, not only impair the obligation of contracts, but, as we have seen, can absolutely annul them, and destroy vested rights. Of course the government cannot do so, for it i



the creation of, and is subordinate to, the supreme authority of the State which made the fundamental law, giving the government its existence and powers, and imposing restrictions on it; such restriction for instance, as these: No *ex post facto* law, and no law impairing contracts shall be passed; no man shall be deprived of property without due process of law, etc., etc.—restrictions first placed in the State constitutions, and afterwards in the Federal one, and now binding on the government as the “supreme law” of the supreme law-giver of the land.

To make this more clear, as well as to show that this line of thought is not merely for the exigency, I beg leave to quote from a letter of mine published in the New York Journal of Commerce, and other papers, in 1856: “Slavery is one of those essential facts which belong to the very constitution or frame-work of society, and fall not within the scope of legislative power, but can be created or destroyed only by act of sovereignty. The sovereign is the people; and if they have not delegated the power, it remains with or in them.

Moreover, legislation means only law-making, or rule-of-action making, and includes not in its scope or meaning the power to create, impair or destroy an institution or part of the frame-work of society, a citizen's property and vested rights, or the obligation of contracts between individuals; and I have long thought that this is the true reason why Congress, although it has the power of exclusive legislation for the District of Columbia, cannot, under said grant of exclusive legislative power, abolish slavery there. Neither can the State or Territorial legislatures, in their respective jurisdictions. But State conventions, representing the sovereignty of the people, can.”

We can now appreciate what I have already stated, that the abolition of slavery and the destruction of the slave tenure, are matters of sovereign jurisdiction exclusively, and are completely above ordinary legislative authority. Statutes and codal provisions could have no effect on proper contracts, except through the judiciary, in enforcement of said contracts, for legal agreements between citizens are law! While the legislature can repeal its own laws, it has no power to repeal the laws which citizens establish *inter sese* by their valid contracts! Lawful agreements of citizens cannot be touched by law-makers, though citizens can, in making them, derogate from the laws.

Article 1940, C. C., provides that “legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them;” and “that no general or specific legislative act can be so construed as to avoid or modify a legal contract previously made.” And Article 1958 provides, that “when the intent of the parties is evident and lawful, neither equity nor usage can be resorted to, in order to enlarge or restrain that intent, nor can any law operate to that effect, unless it be some prohibition or provision, which the parties had no right to modify or renounce.” See also 1895, 1960, 1962. These provisions of the Civil Code are a repetition and amplification of the constitutional declaration, that no law shall be passed impairing the obligation of contracts. It is obvious, from the above, that neither the legislature nor any other department of the government, has any power whatever to act in the premises, and dissolve or nullify contracts or parts thereof; or discharge parties—

much less to destroy property, or the cause and motive of contracts, while the power above the government (that created the government as its agent) can do all these things. It is also obvious that legislators and judges cannot recognize and enforce as valid, any part of those lifeless remains, blasted and scattered by the fatal stroke! but that all their proceedings, laws, orders and decrees, must consist with and be ancillary to their sovereign's act. And it is also obvious that it were absurd to ask the creature, i. e., the government, or any department thereof, to compensate for what the creator has destroyed, especially as no power has been given to do so. The sovereign has not only impaired, but it has destroyed the obligation of these contracts, and there can be no remedy!

2. It is contended that the defendant is still bound by the unexecuted part of the contract, while the plaintiff is bound to no obligation at all. In the attempt to limit the warranty to the matter of title and redhibitory defects, it is forgotten that these warranties exist without words—(C. C. 2450, 2451, 2477; and that this construction makes the phrase "warranted slave for life" of no effect, although the law (C. C. 2479) expressly provides that "the parties may by particular agreement *add* to the obligation of warranty, which results of right from the sale or diminish its effect;" and, moreover, it violates that well-known principle of interpretation, that we must not construe that which is unambiguous, unless the language leads to a positive absurdity or inconsistency, C. C. 1940. So far from this being the case, it would be a positive absurdity to say that the phrase "warranted slave for life," only means what by law is "implied in every sale." C. C. 1757. It also violates the rule, that interpreting a deed, every part of it must be made if possible to take effect, and every word must be made to operate in some way or other. Broom's Legal Maxims, 414—Shep. Touch. 84. But, says the opponent, it refers only to *status* at the time of sale. "Warranted slave" would be enough for that, and no words could add force to the phrase. "For life" means nothing, if not; a continuance of *that status*, i. e., a continuance in the status of a slave during natural life. The language is too plain for construction; but if the seller should succeed in making it doubtful, "any obscure or ambiguous clause is construed against him." C. C. 2449. As in common law, the deed is construed most strongly against the grantor. It will be shown hereafter that the articles on eviction and warranty have no application to this case.

3. I have read, in some judicial opinion, that "no one can guaranty against the acts of the government, because no one can oppose the will of the sovereign."

This is an admirable specimen of the *petitio principii*. In the first place, the Judge forgets that the sovereignty is one thing, and is in the people, and the government is another thing, and is out of the people, but exists and acts by virtue of their delegated power; in other words, the people, as a republic, govern themselves; and the government is their contrivance for doing so. No "guaranty against the acts of the government," indeed! Why the sovereignty itself has guaranteed us all against the very act in question, as well as all other illegal and unjust acts, by establishing equality; by commissioning said government only to do justice; by not

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delegating the power to do this thing, and prohibiting the use of all power not delegated; and by declaring that no man shall "be deprived of his life, liberty or property, without due process of law," as all the States of the Union severally declared in their preëxisting constitutions, and afterwards jointly declared in their Federal one. At all events, this contention is baseless, because there is no "act of the government" in the premises, to give rise to any question of "guaranty against the acts of the government."

Again, if the Judge mean by this phrase, that no one shall by his warranty help to resist, violate or nullify the acts of the government, I quite agree with him; but I feel confident that there is no illegality or impropriety in a party warranting or insuring one, whom he contracts with, against a loss caused by governmental action. And if the plaintiff in this case, has not from the general stipulation of warranty, or from the warranty of title and possession implied by law, provided an exception, he must suffer, for he might have guarded himself. In *Paradine v. Jane*, 27 *Alley*, it is held that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. See also *Harrison v. Lord North*, 1 Ch. ca. 84. Under the law, the plaintiff in this case has undertaken the warranty in question, and has not provided against the loss by the act of the sovereignty. But for this exercise of sovereign authority, the vendee would have the right of action against him. In the somewhat similar case of *Mittelholzer v. Fullarton*, (6 *Adolphus & Ellis*, Q. B. Reports, N. S.) arising in the West Indies, the appellate Court in England, while deciding that there was no guaranty in point of fact, conceded that "if there had been a guaranty (of the services, for the term of six years, of 153 apprenticed laborers), and it had been broken, there would have been a right to a cross action."

It is the plaintiff who, if any body, must apply to the sovereignty for compensation. But in truth, he and the defendant are both discharged by the State from the dissolved contract.

4. For the loss of the slave by emancipation, the purchaser must look to the government. If the government takes your property for works of public utility, you have no recourse against your vendors, but against the government alone."

Which government; the State or the Federal? Both are alike, creations of and subordinate to the sovereignty. It cannot be the Federal, for it did not do the damage. It had no right to destroy (as it had not to establish) any tenure of property; so it would be absurd to ask it to compensate. Moreover, it utterly lacks power, not having been commissioned by the State or "the people," to do so. The same reasons apply to the home government of Louisiana. \* \* \* \* \*

These are not only sufficient replies to the above *obiter dictum* of the Judge, but to the common remark, that "the arguments of the defence are proper in a claim to the legislature for compensation."

But further, the legislature, especially the Federal, has no right to take

property for a purpose "of public utility," unless such purpose and the power be in the constitution. No power to take a slave, much less all slaves, for any purpose, is given, more especially as the pretended use, was not use at all, but simple destruction of the very right to use! And moreover, there is no "purpose" or "work of public utility," that the "taking" of the right of property in a slave, would be necessary to accomplish. "The government takes your property for works of public utility!" Who could imagine that this judicial phraseology meant the abolition of slavery by sovereign power?

It is quite obvious, that neither the sovereignty (nor the government) has taken any property at all, and of course has not used it. But it has declared that such property is no longer property; it has abolished the tenure. "Private property for works of public utility," indeed!

5. The Code throws the loss on the vendee. "*Res perit suo domino.*" This is the main point in the able brief for the plaintiff, in the case of *Knox v. Duplantier*.

Article 2442, provides (under certain modifications as to delivery in 2443-4) that as soon as the contract of sale is complete, the thing is at the risk of the buyer. And Article 2511, glossed by 3522, § 7, provides that if the thing perish by a fortuitous event, (that is, an event which "happens by a cause we cannot resist,") the loss is the buyer's. Article 1892 is also quoted, but as it cannot be said that "all that was intended by the parties was carried into effect at the time," for the intent to pay the price is not yet effectuated; the article does not apply. Moreover, for the same reason, the loss in the case at bar has not occurred *depuis que la vente a reçu sa perfection*. The article can only have reference to an executed contract.

But let us pass all doubts and queries, and concede that the loss in this case is the buyer's, if the thing perish by a fortuitous event, after delivery. Then comes the important question: Do these three ideas concur in our case, as they must, in order to bring it within the above articles: 1st. The idea of the thing; 2d. That of perishing; 3d. That of a fortuitous event. 1st. We may admit the negro to be the thing; 2d. This thing perishes only by death. But let us reason: If the sovereign say, as it can rightfully do, that my books shall be property no longer; or if it declare that a watch, a horse, dogs, or certain animals *feræ naturæ*, that have been regarded as property shall be property no longer, would that be the perishing or destruction referred to? No; because the identical thing still exists unimpaired; and, besides, fortuitous events do not merely destroy tenures, and leave uninjured the things held. In this case, the thing exists just as a dog, book, watch, or horse may, after the owner is dispossessed by loss or theft. The thing has not perished. 3d. Is the abolition of the slave tenure a fortuitous event? Such event is something accidental, e. g., a thunderbolt, freshet, crevasse, tornado, fire, collision, striking a snag, violence, a mob, etc., etc.; but the act of the sovereign is no fortuitous event, (any more than an act of the legislature, or a judgment of the Court would be) for it is a most deliberate exercise of sovereign will by virtue of its conceded right, and upon a professed principle of morality and natural law. "Fortuitous events," indeed!

We may then decisively, say, that these articles can have no application. Let us proceed to examine some others which are cited against us as to eviction and warranty in the aforesaid brief.

Eviction is the loss the buyer suffers from the claim or right of a third person to the thing. C. C. 2476. "Third persons" are all who are not parties. 3522. The plaintiff cites 2476, Domat, p. 230, Nos. 371, 374; also p. 174, No. 190; also Pothier, p. 54, No. 93, repeats his *pater-noster*, *res perit suo domino*, and seems to think he has clinched the nail. Let us see.

Eviction (from *evincere* to overcome—to prevail in law), must mean loss in pursuance of a judgment in favor of a paramount title (see Burrill's, Bouvier's, and Webster's Dictionaries), especially as under the law, no person can be deprived of property without due process of law; so saith the sovereign! Now there has been no judgment of eviction; no right of a third person has prevailed in law. Hence these articles do not apply. \* \* \* \* \*

6. Finally, let us notice a question put from the bench during the argument, involving a very common fallacy: "Shall we throw all the loss on the plaintiff?" I trust the Court will *ex officio* note the defendant's cost of keeping the slave—say for four years; the interest for that time of the unproductive capital represented by the slave and the correlative land; the loss of the slave by emancipation; the consequent abatement of the value of the land, improvements, and other property, directly caused by the loss, to say nothing of other direct or indirect losses, and of moral and mental injuries! The truth is, the debtor has lost more than the creditor, even if the latter do not recover; and I now submit that the real question is: Shall the debtor lose as much more, in order that the creditor shall lose nothing? for the Court must give judgment for principal and interest, if for anything at all; and this, while ruining the defendant, would enable the plaintiff to escape absolutely unharmed by the war or the emancipation! Would we thus be doing equity or equality, as a sovereign?

No! this is all error! The sovereignty intended that the tree should lie as it fell; and that those should suffer who were in the way. For this conclusion, there are two unanswerable reasons: 1st. The abolition of slavery was a deliberate act of war, consummated by conquered and abject States under dictation; and it is not belligerent-like to make or cause reparation except by or under treaty. 2d. The precedent which England had set of compensating for slaves as property, was avoided; and no cure, compensation, remedy or recourse was provided for, and no reclamation is legally possible. No wound is to be healed, except by the *vis medicatrix naturee*; and no ruin is to be repaired except by labor, reproductive energy and time.

TALIAFERRO, J. This suit is brought on a promissory note for the sum of \$452, with interest, from the 26th February, 1861, the time of the maturity of the note.

The defence is:

1st. The prescription of five years.

2d. Failure of consideration, arising from the emancipation of slaves by the sovereign authority.



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Judgment was rendered for the sum specified in the note, but without interest.

The defendant has appealed.

The plaintiff prays an amendment of the judgment, allowing him the interest claimed.

It is admitted that the consideration of the note was the price of an African slave sold at a succession sale.

The first ground of defence we deem it unnecessary to consider.

For the reasons assigned in the case of *Wainwright v. Bridges*, lately decided by this Court, the second ground of defence must prevail.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, that judgment be and is hereby rendered in favor of the defendant, releasing her from the obligation of paying the note sued on, the plaintiff and appellee paying costs in both courts.

Justices LABAUVE and ILSLEY dissenting.

For the reasons given in our dissenting opinion, in the case of *Wainwright v. Bridges*, lately decided, we dissent to the judgment in this case.

JOHN H. ILSLEY,

Associate Justice of the Supreme Court.

ZENON LABAUVE,

Associate Justice.

No. 936.—ROBERT H. BAYLY, Curator, etc., v. THOMAS McKNIGHT.

Where property has been sold at succession sale, and notes executed for the price, with a stipulation in the act of sale and mortgage, that the property sold remains specially mortgaged and hypothecated, with privilege of a vendor in favor of whoever may be the future holder of the notes, any future holder of the notes may obtain an order of seizure and sale of the property mortgaged, in his own name, by exhibiting the notes and act of mortgage, or, in any legal capacity, such as curator, without exhibiting letters of curatorship.

Obligations, executed prior to the first of October, 1862, need no internal revenue stamp to give them validity.

**A** PPEAL from the Third District Court of New Orleans, *Fellows, J.*  
*Roselius & Philips*, for plaintiff and appellee. *Field & Shackelford*,  
for defendant and appellant.

LABAUVE, J. This is an appeal taken from an order of seizure and sale, granted on four mortgage promissory notes, dated 22d March, 1862, signed by the defendant, and by him endorsed in blank.

The defendant and appellant urges that the case should be dismissed, because the evidence upon which the said order is founded, is insufficient and illegal, inasmuch as plaintiff acts as curator of a succession, and he has filed no letter of curatorship, and because the notes sued upon were not stamped when used, with the proper revenue stamps according to the acts of Congress on that subject.

Bayly v. McKnight.

Three notes were executed as part of the price of certain property sold to defendant, at the sale of the succession of Thomas B. Poindexter, and a mortgage was retained on the property to secure the payment of said notes, which are declared in the act to have been subscribed by the purchaser to his own order, and also to have been endorsed by him. It is stated in the act of sale and mortgage, that in order to secure the payment of said notes, with all intetests thereon as aforesaid, the herein above described and conveyed property is and hereby remains bound, mortgaged and specially hypothecated with privilege of vendor, in favor of the succession of the said late Thomas B. Poindexter, or of *whomsoever may be the future holder or holders of said notes*. Any holder of said notes, by exhibiting the same, together with a copy of the act, was entitled to an order of seizure and sale in his own name, or in any legal capacity, such as curator, etc., without producing letters of his alleged capacity, *Louis Marthe v. George McCrystal*, 11 An. 4. *Race & Foster v. Owen Bruen*, 11 An. 34. *Montgomery, Executor, v. Myers*, 2 An. 276. *Rice, Curator, v. David Davis*, 14 An. 435.

The other objection, that the notes were not stamped when used, with the proper internal revenue stamps, according to the acts of Congress on that subject, cannot be maintained.

No stamp is necessary upon an instrument executed prior to the 1st of October, 1862, to make it admissible in evidence. In this case the notes were executed on the 22d March, 1862, we have lately so decided in the case of *Frederic Baur v. Richard Shackelford*, not yet reported.

We are of opinion that the District Court did not err in granting an order of seizure and sale.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, with costs.

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No. 940.—MANUEL BONNIN v. DR. JOSEPH ELLIOTT.

Malicious slander will be punished by the infliction of damages commensurate with the aggravated character of the language used. The doctrine in the case of *Mohrman vs. Oshe*, 17 A. 64 reaffirmed.

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*A. Sambola & Ducros*, for plaintiff and appellee. *Geo. L. Bright*, for defendant and appellant.

HOWELL, J. The motion to dismiss the appeal in this case is unfounded, and must be overruled.

The defendant has appealed from a judgment, in the sum of one thousand dollars damages, for slander.

The words charged are clearly proven, and are of a very defamatory nature; but defendant's counsel contends that they were uttered in an ebullition of passion, without malicious motive, and carry with them no pecuniary responsibility. The circumstances detailed in the record, do not, in our opinion, bring this case within the application of this doctrine. It is true, defendant gave vent to a sudden burst of passion; but

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there was nothing in the language or conduct of the plaintiff on the occasion, to elicit or excuse it; while the opprobrious epithets were repeated by him in plaintiff's shop, and on the banquettes, and one of them again used in an interview sometime afterwards with one of the witnesses. The ruling in the case of *Mohrman v. Oshe*, 17 A. 64, supports the decision in this.

Judgment affirmed.

No. 918.—N. C. FOLGER & SON v. W. S. SLAUGHTER et als.

Defendants had their domicile and residence in one parish, where they had resided for a number of years, from which they removed temporarily to an other parish, to avoid the dangers resulting from the late war, where they engaged in business, and participated in one or two elections by voting, without doing any other act, or signifying their intention of a change of domicile: *Held*—That these acts, of themselves, are not sufficient to cause a change of domicile, and the parties must be considered as still residing at their former domicile, where they must be sued.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J.*  
*W. F. Kernan*, for plaintiffs and appellants. *Burgess & Chaney, Dunn & Haron*, for defendants and appellees.

**TALLAFERRO, J.** The defendants are sued as acceptors of certain drafts drawn in plaintiffs' favor by Young & Holmes. W. S. Slaughter and Alexander Smith, the parties sued, except to the jurisdiction of the Court, on the ground that the parish of East Feliciana is not in the parish of their domicile. The exception was sustained, and the suit dismissed. Plaintiffs have appealed.

But the one question is here presented: Were the defendants domiciliated in the parish of East Feliciana at the time this suit was instituted?

It is shown that both Smith & Slaughter resided in Jackson, in East Feliciana, before and at the time of the institution of this suit; that the latter had resided there about a year before that time, and the former since 1862, a short time after New Orleans was taken by the Federal forces.

It is also shown that Slaughter rented a house in Jackson, and has been living there, and that Smith's family resided in the parish of East Feliciana.

It is further shown that both have, during their residence in Jackson, attended elections there, and also that on one or two occasions they voted there.

Smith, it is proved, was trading in cotton in that parish.

This evidence, we think, overbalanced by the weight and general drift of the testimony on the other side. It is, we think, quite clearly shown that Slaughter has a domicile in the parish of East Baton Rouge; that he lived on his plantation in that parish, near the Mississippi river, from whence he was within range of the cannon on board the Federal gunboats, and that he removed to Jackson to get out of the danger. It is proved that he always expressed his intention to return to his plantation, in East Baton Rouge. The same thing is established, in regard to Smith, whose constant declarations have shown an intention to go back to New

Orleans. The ill health of his wife detained him in Feliciana. The fact of these defendants having voted in Jackson, at elections, once or twice, is not conclusive against the opposite evidence. Irregular voting of this kind is of frequent occurrence, and it should not be allowed too much weight in determining questions of this kind. Persons who, like the defendants, during the late commotions, had to leave their domiciles and undergo a temporary exile, during which they have constantly evinced the will and intention to return to their long established homes, should not be deemed to have changed their domiciles, from having engaged in trade during their sojourn, and from having voted occasionally at loosely conducted elections.

We think the exception was properly sustained.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

No. 1132.—RICHARD TAYLOR *v.* P. G. MOHAN, Comptroller, and M. F. PRATT, Deputy Comptroller.

Where property leased is encumbered with a servitude, or privilege of a date anterior to the lease, the lessee takes the property subject to the encumbrances; and he cannot maintain an action to prohibit the use of the former privileges granted on the property.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.* *Hays, Adams & Moise*, for plaintiff and appellant. *H. D. Ogden*, for defendants and appellees.

*Brief of H. D. Ogden, for defendants and appellees.*—On 24th March, 1865, the legislature passed an act in these words: "That the city corporation of New Orleans be and are hereby authorized to build a good and substantial foot bridge on the New Basin Canal, at the intersection of Liberty street." "That said bridge be so constructed as not to prevent the free egress and ingress of vessels."

The Common Council of New Orleans, in conformity with the above permission, passed resolution No. 148, N. S., (annexed to plaintiff's petition) authorized the comptroller to sell "the building of a foot bridge across the New Canal Basin, at the foot of Liberty street," according to the plans and specifications on file in the Surveyor's office.

The comptroller advertised for sale a bridge "across the New Canal, at the foot of Liberty street."

Voluminous testimony has been offered to show the extraordinary damage which would accrue to the lessee from the building of a bridge, constructed in any manner or way. By the evidence, no plan could be adopted to prevent the loss. It is even estimated, that the damage would amount to at least one hundred thousand dollars for each bridge. The whole testimony, however, is irrelevant; the only question is, had the lessee vested rights, which would be impaired by the construction of the bridge. It is not alleged, that the bridge to be constructed would prevent

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such free egress and ingress of vessels as was intended to be understood by the words of the act. \* \* \* \*

We respectfully submit, that when the plaintiff obtained the lease of his canal and the lands adjoining, it was with all the encumbrances and servitudes attached, as well as the rights and privileges appertaining thereto. The act of 24th March, 1865, imposed a servitude in favor of the city. It was a public act, and the plaintiff was bound to know it. It was a right given and vested in the city at the time that plaintiff acquired his rights. The State being the owner of the adjacent lands, and giving the right so to construct a bridge, necessarily gave with it all such grants and permissions as may be necessary for the exercise and enjoyment of the right. This must be implied. The act of 1865 bestowed a servitude on both—the canal and land.

HOWELL, J. On the 24th April, 1865, the Legislature of the State passed an act authorizing the city of New Orleans to construct a foot bridge across the New Basin Canal, at the intersection of Liberty street. On 10th July, 1866, the Common Council authorized the comptroller to sell the building of a bridge at said point, and said officer advertised the sale thereof; whereupon the plaintiff, who had on 6th March, 1866, leased the said canal, with its property, rights and privileges from the State, enjoined the said comptroller from proceeding with said sale, on the ground that the construction of said bridge would injure his rights under his said lease.

Judgment was rendered in favor of defendants, dissolving the injunction, from which plaintiff appealed.

The right to construct the bridge in question, had been accorded to the city corporation by the State, prior to the lease of said canal to plaintiff, which passed to him with the encumbrances and servitudes established, and not excepted by the State, his lessor. The lessee cannot contest the title of his lessor; but it is not pretended that the State had not the right to grant the privilege of building the bridge.

Judgment affirmed.

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No. 998.—EDWARD CONERY v. C. F. HAYES et al.

After the termination of the partnership, no admission or acknowledgment, by one of the partners, of the correctness of an account made before the dissolution of the partnership, is legal evidence against the other members of the firm.

The admission of a partner, after the dissolution of the partnership to a third party, that an account made before the dissolution is correct, where the amount is over five hundred dollars, is not conclusive against him. C. C. 2357.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J. Randolph, Singleton & Hardie*, for plaintiff and appellee. *B. Egan*, for defendants and appellants.

LSLEY, J. The defendants, C. F. Hayes, Barry Hayes and C. D. Hayes, are sued by the plaintiff to recover from them, as commercial partners,



owning the steamboat Starlight, engaged in the carrying trade, the sum of sixteen hundred and thirty-one dollars, with interest, for boat stores and necessary supplies, furnished the said boat, between the 25th February, 1862, and the 12th February, 1863.

The defendants separated in their answers; each pleaded the general issue, and the prescription of *one* and *three* years.

Afterwards, each of them filed an amended answer. Barry Hayes claimed to have been always the sole owner of the boat, and C. F. and C. D. Hayes denied ever having had any interest in her.

Judgment was rendered in the lower Court in favor of the plaintiff and against all the defendants, *in solido*, for the amount claimed, interest and costs.

The testimony in the record establishes that, during the whole period which the amount embraces, the defendants were the joint owners of the Starlight. There was no special contract of partnership, but the nature of the business done during that period by the boat on account of the said owners, constituted them *quoad hoc*, commercial partners, and they became liable *in solido* for the current debts of the boat.

The property, or ownership of the boat, was not brought into the partnership; it was the mere *use* of it. See *Owens v. Davis*, 15 An. 23. 2 Rob. 229. 6 An. 293. 14 An. 437. And when the use of the boat ceased to be available for any purpose, as it did by the seizure and detention of it by the United States military authorities, the partnership terminated, and the individual members merely retained their title to and interest in the boat, as joint owners.

After the termination of the partnership, no admission or acknowledgment by a partner of the correctness of the plaintiff's account could be deemed legal evidence against the others. 5 Rob. 172. 6 R. 127, 256. 11 Rob. 458. 12 Rob. 252. 2 An. 272.

The acknowledgment, in writing, made by C. F. Hayes, that the plaintiff's account was correct, is conclusive against him, and thence no prescription but that mentioned in the C. C. 3508, applied to it.

As against C. D. Hayes and Barry Hayes, the claim is not established by legal evidence.

Neither the plaintiff's books nor the testimony of the clerk, whose information was derived exclusively from the books, and from no other source objected to, was valid testimony. This doctrine is well settled in our jurisprudence. *Byrne v. Grayson*, 15 An. 457. 2 N. S. 509. 4 N. S. 383. 12 Rob. 407. 12 An. 770.

This evidence, and the admission of C. F. Hayes being excluded as against C. D. and Barry Hayes, there is not sufficient evidence to charge either of them.

Barry Hayes did, according to the testimony of one witness, admit the account to be correct; but the claim exceeding five hundred dollars, and there being no corroborative testimony, it fails to make the demand against him certain. Art. 2257, *Dartes v. Decuir*, 5 Rob. 480. *Succession of Segond*, 7 Rob. 111. *McRae v. Marshall*, 1 An. 29.

It is therefore ordered, adjudged and decreed, that as far as the judgment of the District Court is against C. D. Hayes and Barry Hayes, and in favor of the plaintiff, it be annulled, avoided and reversed. It is fur-

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ther ordered that the judgment be and it is hereby rendered in favor of these two defendants, and against the plaintiff, with costs in both courts. It is further ordered, that so far as the said judgment of the District Court is in favor of the plaintiff and against the defendant, C. F. Hayes, that it be affirmed, the costs of appeal to be paid by that defendant.

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No. 937.—SYDNEY B. ROBERTSON v. A. LEVY AND WIFE.

An agent cannot bind his principal on a promissory note, under a general power of attorney. To bind the principal on the note the power of the agent must be express and special. C. C. 2906.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*M. Grivot*, for plaintiff and appellee. *Ed. Philips*, for defendants and appellants.

**LSLEY, J.** A motion is made to dismiss the appeal in this case, on several grounds, but the facts stated to sustain the motion do not appear in the record.

The appeal is regular in every respect, and the motion to dismiss is overruled.

The only evidence found in the record to sustain the judgment of the lower Court is the promissory note sued on, purporting to have been signed by J. Levy, as agent for Mr. and Mrs. A. Levy, and the consideration of the note is stated to be for supplies for the Hope plantation. The defendants were interrogated on facts and articles—first, in relation to the genuineness of the signature of J. Levy on the note; and second, as to whether Jules Levy was the agent, and empowered to administer their Hope plantation, in the parish of Pointe Coupee. These taken for confessed, merely prove the signature of J. Levy, and that he was the agent, and empowered to administer the Hope plantation of the defendants.

The agent had only general powers of administration, but no special authorization to sign the note for the defendants is shown. C. C. 2966, *Nugent v. Hickey*, 2 An. 358.

It is neither alleged nor proved, that the wife was separate in property from her husband, or that the debt inured to her separate benefit; on the contrary, the allegation that the note was given for supplies for a plantation belonging to Mr. and Mrs. Levy, show that it was a community debt. 14 A. 712.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that judgment be and it is hereby rendered in favor of the defendants and against the plaintiff, as in case of nonsuit, and that the plaintiff pay the costs in both courts.

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No. 1382.—JOHN ARROWSMITH v. N. H. RAPPELGE et al.

To entitle a party to an appeal it must be shown that he has an interest in maintaining or reversing the judgment of the lower Court.

No damages will be allowed on appeal, except on moneyed judgments. C. P. 907.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J.*  
*P. Soule and Jas. C. Walker*, for plaintiff and appellee. *Buchanan & Gilmore*, for defendant and appellant.

Arrowamith v. Rappelge et al.

TALIAFERRO, J. This case is before the Court, on a motion to dismiss. The plaintiff brought a petitory action against Rappelge, to recover six squares of ground lying within the city limits. Subsequently by amended petitions, he caused first, Mrs. McCormick, and afterwards Giraud, to be made parties defendants to the suit. He sues the first two for six squares of ground, and the third, Giraud, for one of the six squares. Giraud called Mrs. Ann Hook, Gaston de Pontalba and Alfred de Pontalba in warranty.

Pending the delays to call in the warrantors the plaintiff took judgment final against Rappelge alone. From this judgment Giraud took an appeal.

The plaintiff and appellee moves to dismiss the appeal, on the grounds:

1. That the appellant has no interest in the judgment appealed from, and has not been aggrieved by it.
2. That the appellant has not made his co-defendant, Rappelge, and his warrantors, parties to the appeal.

We are of opinion that the appellant was not required to make his co-defendant and warrantors parties, as we do not see what interest they can have in the judgment being maintained.

Nor is it clear that the appellant himself has any interest in, or that his rights are affected by the judgment rendered against his co-defendant, Rappelge. The appellant is not a party to that judgment. It determines only that the plaintiff is owner *as against* Rappelge. The appellant, it seems, would lose nothing, if the judgment against Rappelge were maintained, and gain nothing by its reversal.

The appellee prays damages for a frivolous appeal. The judgment appealed from is not what is termed a money judgment, and damages cannot be allowed. C. P. Art. 907.

It is therefore ordered that the appeal be dismissed, at the costs of appellant. 1 N. S. 4 N. S. 342. 2 Rob. 391.

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No. 927.—JAMES H. BOWMAN v. JAMES GONEGAL.

A contract was entered into, during the existence of the late war, between defendant, residing in the city of New Orleans, after the occupation of the city by the Federal forces, with John J. Pettus, then Governor of Mississippi, one of the so-called Confederate States, for the supply of the so-called Confederates, with a large quantity of salt and other goods, in exchange for cotton and other produce: *Held*—That the contract so made is illegal on its face, absolutely null and void, and cannot be judicially enforced.

The Supreme Court of Louisiana will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it to be suggested without any plea, and at any stage of the proceedings.

A contract must have a lawful purpose, and if it have an unlawful cause—if it be contrary to good morals or public order, it can have no effect.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.* Harrison & Hunton, for plaintiff and appellant. Sullivan, Billings & Hughes, for defendant and appellee.

*Brief of Harrison & Hunton, for plaintiff and appellant.*—The Court below dismissed the petition, because, in its opinion, the contract with

Governor Pettus was illegal, and because that illegality vitiated the contract between plaintiff and defendant.

With all due respect for that Court, we insist that Bowman's right to the \$5,000 is in no manner affected by the illegality of those contracts, even if they be illegal.

If those contracts were *legal* they would, of course, present no obstacle in the way of a recovery by plaintiff. If, however, they were illegal, it was the duty of the parties to abandon them. The parties did abandon these contracts by a failure to execute them. But whether they were abandoned or not, the plaintiff had the right to withdraw the money advanced by him for an illegal purpose, (if it was illegal) at any time before it was applied to that purpose, and thus in the exercise of a clear right this suit was brought. 2d Parson's Contracts, page 253.

Thus, money staked as a bet on an election, or any unlawful game, may be recovered at any time before payment to the winner. See 2d Smith's Leading Cases, top pages 307, 308, 458; 2d Kent, side pages, 467, 468.

The law recognizes a *locus penitentie*, and this *locus penitentie* continues until the illegal purpose is consummated.

Had the contract with Governor Pettus been carried into effect by Gonegal, plaintiff would have had an equal interest in the profit and loss thereof as partner, and even if it were illegal, yet under the decision of the Supreme Court of the United States, in the case of *Brooks v. Martin*, 2d Wallace, page 70, this Court would not permit Gonegal to rely on the illegality to secure the profit to himself, or to defeat plaintiff's right to an account.

That contract, however, was not carried into effect, nor is plaintiff claiming any rights under it or under either of them. There is no mode for the enforcement of a right under an express contract, except by a specific execution, or by damages for a breach of it; plaintiff, however, claims neither the one nor the other. Any such claim, under an illegal contract, would be defeated on the well-established principle, that the Courts will not aid in the enforcement of an illegal contract. So far from attempting to enforce either of these contracts, the present action is based on the fact, that these contracts were abandoned by common consent, or that it was impossible or unlawful to carry them into effect; and, therefore, that plaintiff was, in either of these events, entitled to a return of his money.

But, are these contracts illegal?

The Courts never presume illegality, and therefore never pronounce a contract illegal, if it be susceptible of any other interpretation. See Henning's Dig. (new edition) 2d vol., page 1013, Art. 17; also page 1012, Article 1.

Brief of Sullivan, Billings & Hughes, for defendant and appellee.—

\* \* \* II. We shall now proceed to show that the advance of this Confederate currency, the whole transaction entered into and enterprise contemplated by the parties were illegal, and that the illegality was of such a nature as to preclude any action being maintained, either based on this advance or directly on the contract, or springing out of anything done as an inducement or aid connected with it.

First. The five thousand dollars, being in currency issued by the so-called Confederate States, and having been advanced by plaintiff to be used for the joint benefit of himself and defendant, cannot form the basis of an action.

The Confederate notes were payable only in case the Confederate government was acknowledged—only in case the rebellion succeeded. They were, therefore, *pro tanto* pledges for its success, and the inducing others to take them was nothing but the accumulating in the community motives, tending directly to the success of treason. Now the plaintiff seeks to recover for these seeds of destruction, which he says he passed to defendant to be scattered for their joint benefit. The case is stronger than the one put by Chief Justice Eyre, in *Lightfoot v. Tenant*, 3 Bos. & Pull. 356, of "the man who sold arsenic to one whom he knew intended to poison his wife with it." For, while arsenic might be used for a good purpose, any disposition of the Confederate currency would be criminal.

Secondly. The plaintiff asks the Court to hear his case, which is, that for the purpose of being admitted as a partner in a contract made between defendant and Governor Pettus, of Mississippi, he made an advance which he invokes the aid of the Court to enable him to recover back. Now, an examination of the references to this contract, pages, (5, 6 and 7) shows that Gonegal entered into this contract with Pettus, in his capacity as governor. It was therefore a contract to furnish the head of an organized community of public enemies with provisions. It was an offence punishable by our Articles of War, with death.

Articles of War adopted by Congress, April 10, 1806, Art. 56: "Who-soever shall relieve the enemy with money, victuals or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court martial," Revised U. S. Army Regulations, 1863, p. 494.

And a necessary portion of the plaintiff's case is, that he made his advance to aid in carrying out this contract.

Thirdly. The contract into which plaintiff was thus admitted, and for the furtherance of which he advanced whatever he did advance, was a contract by which Gonegal, a resident of New Orleans, agreed to carry across our lines into the enemy's country some 50,000 sacks of salt. As to the illegality of the contract, in this respect, the attention of Your Honors is respectfully asked to point II, in the brief of defendant, in *Fee v. Gonegal*, No. 919. See *Davis v. Holbrook*, 1 An. 176.

This was an action brought to recover \$500, the amount of a bet deposited by plaintiff with defendant as stakeholder.

The Court, after a thorough review of the decisions in the Federal and State Courts, as well as our own Courts, say (p. 179): "Before the question, whether the stakeholder shall be permitted to retain what does not belong to him, stands another, which overshadows it, which is, whether the plaintiff can be heard when he asks the assistance of the Court to relieve him from the consequences of having violated the law. It is our duty to say that he cannot. The law leaves him where his conduct has placed him. \* \* \*



ILSLEY, J. The present action grows out of the following agreement, entered into in Mississippi, on the 27th March, 1863, between the parties to this suit:

"Whereas, James Gonegal has this day entered into a contract with John J. Pettus, Governor of the State of Mississippi, whereby the said Gonegal agreed to exchange fifty thousand sacks of salt for cotton; and whereas the said James H. Bowman and the said Gonegal have agreed to become partners in the said contract; and, whereas, the said Bowman has advanced five thousand dollars in cash, to be used as capital in carrying the said contract into effect; now, in consideration of the premises, it is agreed that the said Bowman becomes an equal partner with the said Gonegal, with said John J. Pettus, governor as aforesaid, and all profits and losses arising from said contract are to be shared and divided equally between the said Bowman and the said Gonegal, and if any other goods of any kind are brought from New Orleans by the said Gonegal, the said Bowman and Gonegal are to become equal partners in the same, and share equally all profits and losses arising therefrom."

And the present suit is to recover back from the defendant the five thousand dollars in cash, which was, by the agreement, to have been, but was not, used by the defendant to carry out the same.

The answer of the defendant admits the receipt of the nominal amount claimed under the agreement, but avers that the said sum was advanced by the plaintiff in the currency of the so-called Confederate States, and that he was prevented from using it on account of the unexpected situation of military affairs, and the change in the lines of the armies of the United States and so-called Confederate States, and he makes a tender of the amount in the same species of paper.

There was judgment in the Court below for the defendant, and the plaintiff has appealed.

It is urged in this Court by the appellee, that the cause of the agreement was unlawful and against good morals and public order; but it is contended on the other side, that the question of illegality, in the consideration or object of a written contract, is properly raised in only one of two modes: 1st. Where the contract, *on its face*, admits of no other construction but an *illegal* one. 2d. Where the contract is *prima facie* legal, and the defendant brings up the question by pleading and proving the illegality.

It has been repeatedly held by this Court, that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it to be suggested without any plea, and at any stage of the proceedings. 2 Hen. p. 1007, § 1. When it appears clearly that the agreement is for an illegal purpose the Court will dismiss the parties; but this is in the interest of public justice, and not of the party who seeks to profit by the acts of his adversary, of which he has been the participant. 6 An. 317.

The question then is, whether the contracts between the Governor of Mississippi and the defendant, and between the plaintiff and the defendant, on which the plaintiff's action is based, read in connection with the momentous events that were in progress at the time the contracts were executed, and which we notice judicially are stamped with illegality—if

so, the plaintiff's action must be dismissed. "Ubi dantis et acceptantis turpitudine versatur non posse repeti decimus."

The object of the war then waged was on the part of one of the belligerents to sever the Union, and to destroy the government of the United States, and any contract that tended to aid in the consummation of that object was in direct violation of law, and it was manifestly with the interest of promoting this object that the contracts referred to were entered into. They were agreements to supply enemies of the United States, whilst a state of war was existing—with a large quantity of salt and other goods, of any kind, to be transported from New Orleans into the lines of the Confederate (so-called) army.

There is nothing redeeming on the face of the contract referred to. It is in view of the then existing state of things, stamped with illegality, and nothing appears in the record to efface the taint with which it is imbued. It is not even shown that the plaintiff voluntarily abandoned the speculation.

In Brooms' Legal Maxims, marginal paging, 643, a case is put which seems to have a practical bearing on the position which the plaintiff occupies in this suit. It is this: "If A agrees to give B money for doing an illegal act, B cannot, although he do the act, recover the money by an action; yet, if the money be paid, A cannot recover it back. So the premium paid on an illegal insurance, to recover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss. And at page 645, the author thus sums up the law, on the subject of illegality, as affecting the standing of parties in Court:

"Upon the whole, then, it seems that the true test for determining whether or not the objection that plaintiff and defendant were *in pari delicto* can be sustained, is by considering whether the plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he himself was a party. For instance, A based an illegal wager with B, in which C agreed with A to take a share; B lost the wager, and A, in expectation that B would pay the amount on a certain day, advanced to C his share of the winnings. B died insolvent before the day, and the bet was never paid; it was held that A could not recover from C the sum thus advanced." The plaintiff, observed Gibbs, C. J., (*Simpson v. Bloss*, 7 Taunt. 246, 250), says: "The payment was on a condition which has failed, but that condition was that B, who was concerned with the plaintiff and defendant in the illegal transaction should make good his part by paying the whole bet to the plaintiff, and it is impossible to prove the failure of this condition without going into the illegal contract in which all the parties are equally concerned.

We think, therefore, that the plaintiff's claim is so mixed up with the illegal transactions, in which he and the defendant B were jointly engaged, that it cannot be established without going into proof of that transaction, and therefore cannot be enforced in a Court of law.

In the case of *Armstrong v. Foley*, 11 Wheat. 258, as was said by this Court in *Davis v. Holbrook*, 1 An. page 178, the Supreme Court of the United States, through its organ, Chief Justice Marshall, lays it down, as a general principle, which is perfectly settled, that no action can be main-

tained on a contract, the consideration of which is wicked in itself, or prohibited by law; and the Court, after declaring valid contracts unconnected with the original illegal act, although remotely caused by it, continues:

"But if the importation is the result of a scheme between the plaintiff and defendant, or if the defendant has any interest in the goods, or if they are consigned to him with his privity, in order that he may protect them from the owner, a promise to repay any advances made under such understanding or agreement is utterly void." *Davis v. Holbrook*, 1 An. 178. *Gravier's Curator v. Carraby's Executor*, 17 La. 131.

A contract must have a lawful purpose—and, if it have an unlawful cause, if it be contrary to good morals or public order, it can have no effect. Civil Code, Arts. 1772, 1887, 1888, Pothier's Obligations, § 43 *e seq*; *Bartle v. Coleman*, 4 Peters 186.

Marcadé, differing from many *jurisconsults*, imbued with the doctrine of the Roman law and taught by Pothier, that the law cannot be invoked to sustain an action based upon an illicit agreement. He says the articles of the French Code, identical with our own, will not permit one man to enrich himself at the expense of another. And that Article, 1376, C. N., declares in the most absolute manner, that whoever receives what is not due to him must restore it, without any distinction—*why* or *how* the thing not due came into his hands. This obligation of restoration with us, exists only in cases in which an alleged benefit arises from a lawful act.

Our Courts will not condescend to decide controversies tainted with illegality or immorality, as "*Nemo allegans suam turpitudinem est audiendus*." They deem such agreements absolute nullities, and *quod nullius est confirmari nequit*.

It is therefore ordered, adjudged and decreed, that the plaintiff's action be dismissed, at the costs of the appellant.

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No. 700.—HENRY SAMORY v. SAMUEL M. MONTGOMERY.

Where a party, whilst residing in Louisiana, executes a mortgage on his property here, and afterwards removes with his family to another State or country, and remains absent for two or three years, leaving no agent in charge of his property, or authorized to represent him, nor housekeeper in possession of his former domicile and residence, with no known intention of returning, he must be regarded and treated by the mortgage creditor as an absentee, who in a suit against the property mortgaged, may cause a curator *ad hoc* to be appointed to represent the absentee, with whom proceedings can be conducted contradictorily, and a valid judgment rendered against him.

A non-resident is entitled to an appeal within two years from the date of the judgment of the lower Court.

Where a party takes an appeal, as an absentee within two years, but more than one year from the date of the judgment appealed from, he cannot, after the appeal is granted, claim to be a resident, for the purpose of defeating the judgment of the lower Court, rendered in conformity with the proceedings authorized by law, against absentees and non-residents.

**A** PPEAL from the Third District Court of New Orleans, *Handlin, J. F. Filleul* and *Randell Hunt*, for plaintiff and appellee. *Wm. H. Hunt*, for defendant and appellant.

*Brief of Randell Hunt, for plaintiff and appellee.*—Samuel M. Montgomery appeals from a judgment rendered against him on the 8th December,

1863. His petition for an appeal was filed on the 15th July, 1865—more than nineteen months after the judgment was rendered and signed.

He alleges that he is a resident of New Orleans; that the judgment was obtained during his temporary absence from the State, and that by law he had a right to take a devolutive appeal from said judgment at any time within two years from the day of rendition.

The right of appeal is essential to the correct and pure administration of justice, but the public good requires that the right shall be exercised within a definite time, in order to put an end to litigation and uncertainty as to the law and the rights of individuals.

Now, the law of this State, in regulating and fixing the time of appeal, has drawn a distinction between parties who claim the right. It divides them into two separate and distinctive classes—one class embracing and comprising all parties who reside in the State; the other, all parties who are absent from it. To the former, it allows one year; to the latter, two years for the exercise of the right; but each class is limited to its allotted time, and is prohibited forever thereafter from exercising it. Code of Practice, Art. 593. "No appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered, if the party claiming the same reside in the State, and after two years if he be absent therefrom."

Content with this distinction and division the law makes no further discrimination between parties claiming appeals. It does not subdivide, separate and distribute into different and subordinate classes those who reside in the State or those who are absent therefrom. It deals in the general, and avoids, rejects or ignores the special and particular. It prescribes one general rule for all who reside in the State, including every one who resides therein. In like manner, it prescribes one general rule for all who are absent from the State, including every one absent therefrom. Every party, then, who claims an appeal must fall within one or the other of these categories. He must be included either in the class of those who reside in the State, or in the class of those who are absent from it. If included in the first class, his right of appeal is barred by the lapse of one year; if included in the class of the absent, his right extends through a period of two entire years.

Now, Samuel M. Montgomery either resided in the State, or was absent therefrom. If he resided in the State, no appeal lay on the 15th July, 1865, the day of his petition of appeal, from the judgment rendered against him on the 8th December, 1863, because more than a year had expired after the judgment was rendered, and this Court must reject this appeal. But if, on the other hand, he was absent from the State, the appeal did lie at the time he claimed it, because two years had not expired from the rendition and signing of the judgment. He can only maintain his appeal upon the ground that he did not reside in the State, and was absent therefrom.

What, then, is his position? Did he reside in the State? If he did, his appeal is gone. If he did not, his entire argument against the judgment appealed from is futile. Which horn of the dilemma will he take?

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In this condition of things the question presented itself to the plaintiff:

What was he to do to secure his rights, and to obtain the payment of the large amount due him by the defendant, and of which he stood much in need?

He had no alternative; no means or recourse but to enforce his mortgage right. The act securing that right, contained a confession of judgment in his favor, and expressly conferred upon him authority to seize and sell the mortgaged property under executory process. It went further, and waived and renounced, on the part of the mortgagor, the benefit of appraisement—dispensing with the same, and empowering the mortgagee “to seize and sell the property without appraisement.”

The plaintiff, however, did not proceed in this summary manner, although he might have lawfully pursued his remedy *via executiva* under the mortgage, and might have had the property sold without appraisement, yet he would not. He adopted a milder course, and proceeded *via ordinaria*. He obtained a judgment, and had the property appraised—a legal representative of Montgomery joining in the appraisement. All the other provisions of law, made for the purpose of securing to a debtor the full value of property sold under judgments of Courts of this State, were observed. The property was duly advertised, and all persons desirous of purchasing it had the opportunity of competing for it. It was sold at auction; it brought more than two-thirds of its appraised value, and was adjudicated to the plaintiff, because he was the highest bidder for it. \* \*

First. He contends that he was not properly and duly cited; that the appointment of a curator *ad hoc* to represent him was not warranted by law; that there was no *contestatio litis*, and, therefore, that the judgment is a nullity.

Second. That he had an attorney in fact, whose name appeared in the petition, and who was a resident of New Orleans, and no citation was served upon him.

Third. The judgment, if not a nullity, must be restricted to the property mortgaged.

Neither of these grounds is sufficient to support the defendant's appeal. Let us examine them in the order in which they are stated, and

First. The allegation that he was not cited in the Court below, and that the appointment of a curator *ad hoc* to represent him was illegal.

His argument, in support of this ground, is substantially:

“This is an action *in personam*. The petition and the notarial records annexed, show clearly that the acknowledged residence of the defendant was in New Orleans. The law required the citation and petition to be served on the defendant, in person; or, if he was absent to be delivered to a free person, apparently above the age of fourteen years, living in the house. C. P. Art. 187-89. There is no other mode in which the citation and the petition in this case could have been served. Art. 190 of the Code of Practice is express: “The petition and citation must have been served on the defendant in person, or left at his domicile, in the manner provided in the two preceding articles.” They were not so served.”

“The sheriff's return on the citation was, “that he learned the defendant was out of the State.” This was not a substantial compliance with the Code of Practice. If the defendant was out of the State, he may have been temporarily absent, and the citation should have been served



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at his domicile, to which it appears he has since returned. It is not the act of inhabitation (or residence) which constitutes the domicile, but the fact coupled with the intention of remaining. The plaintiff, therefore, was not entitled to have a curator *ad hoc* appointed to represent the defendant. There was no citation, no *contestatio litis* in the case, and the judgment is a nullity."

The argument is well summed up by my learned colleague, Mr. Filleul, in these words: "The theory upon which the appellant bases his hopes of success is, that the plaintiff's action is a personal action, and that such an action cannot be prosecuted unless the defendant be served with process of citation, according to Arts. C. P. 189, 190, that is, personally, or at his domicile." \* \* \*

Our law declares, that an action by which a person proceeds against one who is personally bound towards him, in order to compel him to pay what he owes to him, is a personal action; and it is called personal because it is attached to the person bound, and follows him everywhere. It lies against him who has bound himself personally and independently of the property which he possesses. C. P., Art. 326. On the other hand, a real action relates to claims on immovable property or to the rights to which they are subjected. It lies to enforce the rights which a party possesses upon property. It not only lies against the debtor, in whose hands the property is, but it lies also against him who, without having contracted any obligation towards the plaintiff, is nevertheless bound towards him as the possessor of immovable property, on which the plaintiff claims a right. The action which the creditor brings, in order to have property which has been hypothecated or mortgaged to him by his debtor, seized and sold for the payment of his debt, is a real action. Where the creditor has no executory title against his debtor, he can only seize and sell hypothecated property after having obtained judgment in the usual form. But where he has such a title he may proceed either *via executiva* or *via ordinaria*. C. P., Arts. 7, 41, 42, 61, 62, 63. The mixed action partakes both of the real and the personal action.

Now, what was the action instituted in this case? What was its object? What judgment did it seek?

The plaintiff, in his petition, alleged himself to be the owner of certain promissory notes, amounting to \$15,640, exclusive of interest, drawn by the defendant, and secured by mortgage of a certain lot of ground, with the buildings thereon, forming the corner of Camp and Common streets, in this city. He prayed that the defendant be cited to appear and answer, and after due proceedings, condemned to pay the amount, with mortgage privilege upon the property described.

Citation was issued. The sheriff returned it, endorsed as follows: Received, November 9th, 1863. After diligent search and inquiry made, S. McCutcheon Montgomery could not be found, and I learned that he was out of the State. Returned, November 18th, 1863.

The plaintiff thereupon presented a supplemental petition to the Court, in which he set forth the absence of the defendant from the State. He alleged, "that he has instituted before this Court a suit against the defendant, a resident of this city, founded on obligations secured by mortgage; that the said defendant has been (ordered to be) duly cited, but after dil-

igent search and inquiry made he could not be found, and the competent officer charged to deliver him the petition and citation, was informed that he was out of the State, as it fully appears by the sheriff's return of the papers made in this case." He proceeded to allege further, that "this suit is instituted for the purpose of subjecting the mortgaged property to the payment of said debt; but, as the said Samuel McCutcheon Montgomery is absent from the State, it is necessary to appoint a curator *ad hoc* to represent him, in order that judgment may be rendered contradictorily with the said curator in this suit."

The Court appointed a curator *ad hoc*, and after due proceedings, rendered a judgment in favor of the plaintiff and against the defendant, for the amount claimed, with lien and privilege on the property mortgaged.

\* \* \* \*

I leave this point with simply quoting the statement from 2d Annual, already referred to:

"One who owns real estate in this State, specially mortgaged to secure the payment of a note, and is not represented by any agent authorized to defend suits instituted against him, may be sued for the purpose of subjecting the mortgaged property to the payment of the debt, by the appointment of a curator to represent him; a judgment rendered contradictorily with such curator will be binding on the absentee, as far as it can be executed on the property specially affected, in favor of the creditor. Such judgment can have no effect beyond the property mortgaged."

And now I proceed to examine the second link in the chain of the defendant's argument. He says:

"The petition and notarial acts annexed to it, show that the defendant was a resident of New Orleans. He repeats this, with a mere verbal change, in the same page: 'The plaintiff's petition, and the notarial acts annexed to it, establish the fact that the defendant was a resident of New Orleans.' And then again repeats it as a matter proved, in a subsequent page: 'The plaintiff's petition, and the notarial records annexed, show clearly, as already seen, that the acknowledged residence of the defendant was in New Orleans. He, therefore, should have been served at that acknowledged residence, as the Code of Practice requires.'"

This position is utterly irreconcilable with that hitherto maintained by the defendant. The Court has seen that if a party reside in the State he cannot appeal after a year has expired, from the day on which a final judgment was rendered against him, and that Montgomery now claims the appeal nineteen months after the judgment in this case was rendered against him, upon the ground that he did not reside in the State, and was absent therefrom. How then can he say that he was a resident of this State? He is precluded from making the assertion by the very fact of appearing before the Court. \* \* \*

This leads me to the examination of other links in the defendant's chain of argument. He says:

"The Code of Practice requires citation and petition to be served, by being delivered to a defendant in person, or by being left at his domicile; if he be absent, with a free person, apparently above the age of fourteen

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years, living in the house." C. P. Arts. 87, 88, 89 and 90. The Supreme Court has decided that the return of the sheriff should, on all occasions, follow substantially these words of the Code of Practice; but the sheriff did not, in this case, serve the petition and citation on Montgomery in person, nor leave them at his domicile in the manner provided by law. His return on the citation, that he learned the defendant was out of the State, was not a substantial compliance with the Code of Practice, and did not authorize the appointment of a curator *ad hoc* to represent the defendant. The defendant may have been temporarily absent, as proves to have been the case, and citation should have been served at his domicile, to which it appears he has since returned. He was not an absentee, in the sense of the Code, authorizing the appointment of a curator *ad hoc*.

The term absentee embraces a person who has resided in the State, and has departed without leaving any one to represent him. It means, also, the person who never was domiciled in the State, and resided abroad. C. C. Art. 3522, No. 3. The Code thus declares a person an absentee only when he has abandoned his domicile in this State, with the intention of not returning within any definite period. The judgment is a nullity for want of citation."

The greater part of this has already been refuted in simply investigating the fact of Montgomery's residence. Such is the force of truth! Error flies before it, or falls prostrate and harmless at its feet. The sheriff could not serve the citation personally upon Montgomery in New Orleans, because Montgomery was absent from the State. He could not leave it at his domicile or residence, because Montgomery had no domicile in New Orleans. The record proves that his family was in Virginia from the beginning of the month of December, 1861, and that he himself left New Orleans in January, 1862, and never returned until July, 1863. He thus departed from the State, and was absent from it nearly a year before the proceedings in the case were begun—without making any provision for the payment of his debts to the plaintiff, and without leaving a domicile in it occupied by his family, at which legal notice could be served upon him.

Having rendered it physically and legally impossible for the sheriff to serve a citation upon him in person or at his domicile, nothing was left for that officer, to whom the citation had been issued to be served, and who had vainly made diligent search and inquiry after him, and had learned that he was out of the State, but to return the citation and state the facts to the Court. This was done in the manner I have described. If any attempt had been made by the plaintiff to obtain a judgment by default upon this return, the Court would undoubtedly have refused it, because of the insufficiency of the return. If, from inadvertency or error, the Court below had granted and afterwards confirmed such a judgment, this Court, upon a proper application, would certainly have set it aside. But the plaintiff made no such attempt. Nor did he sue out a new citation to be served on the defendant, for he knew it would be vain and impossible to serve it, or make any further attempt to bring the defendant into Court by this means. He saw, then, that it was useless to hope for any judgment rendered upon citation. What was he to do?

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Here was Montgomery, a person absent from the State, but who owned property in it, which gave jurisdiction to the Court; that property was specially mortgaged to secure the payment of the notes on which the plaintiff was suing, and Montgomery was unrepresented by an agent authorized to defend suits against him. Did he belong to the class of absentees, who may be brought before our Courts through curators?

The first chapter of the third title of the Louisiana Code, which treats of the curatorship of absentees, provides for the appointment of curators for the benefit of those persons, in order that their estates may be administered and their interests protected. The fifty-seventh article of the chapter afterwards provides curators to them, in particular cases, for the benefit of persons who may have suits to institute against absentees, and are unable to commence them, because the absentees cannot be arrested, nor citation served either personally or at their domicile. C. C., Arts. 50 and 57, *George v. Fitzgerald*, 12 La. 600.

The Article 116, of the Code of Practice, contains a very similar provision to that of Article 57 of the Civil Code.

A question soon arose, and was presented to the Supreme Court: What is the meaning of the words "absent" and "absentee," in those provisions of our law?

The Article 3522, of the Civil Code, *de verborum significatione* was referred to, and the definition relied on by Montgomery, was examined. It was determined that the part of it in these words: "Absentee is the person who has resided in the State, and has departed without having any one to represent him"—included persons who temporarily resided out of the State, as well as those who abandoned their domicile therein permanently, and that persons who leave the State and reside abroad, with the intention of returning within a definite time, are such absentees as may have their property in the State subjected to the payment of their just debts, through curators duly appointed to represent them; and this is in conformity with the obvious dictates of justice and enlightened public policy.

The first case, in which the appointment of a curator *ad hoc* to represent an absent defendant, under the provisions of this Code, was presented to the Court—was one of great interest—not only from its novelty, but from the distinguished character of the defendant, and the circumstances under which he was sued.

Edward Livingston was a practising lawyer at the bar of New Orleans, of great eminence and ability, remarkable at once for powers of learning, eloquence and powers of argument. He came to New Orleans soon after the acquisition of Louisiana by the United States, and fixed his domicile in the State. He continued to reside here with his family until the year 1825, when he was elected a member of the House of Representatives of the United States from this State. He went to Washington to discharge his official duties, with the intention of returning to his home in Louisiana, the seat of his affections, after the expiration of his term of office. While he was in attendance on Congress he was sued by one Ramsey, who, on the sheriff's return, that Livingston was not to be found in New Orleans, had a curator *ad hoc* appointed to represent him. Under these circumstances, the question was presented to the Court, whether Living-

ston was an absentee in the sense in which that word is used, in the part of the Code that treats of the appointment of curators? The question was ably argued, and the Supreme Court of the State, after careful consideration, unanimously held that he was. Neither the fact that he was absent on public service, nor that the office of a member of the House of Representatives was merely temporary for a term of two years only, nor the provision of law, that a citizen accepting such an office retains his ancient domicile, (C. C. Art. 46) was considered as excepting him from the class of absentees. The Court said:

"Curators are appointed at times for the interest of the absentee; at others, for that of the creditors; as when he leaves his concerns in such a situation that those creditors cannot establish their claims or enforce payment. In such a case justice as forcibly requires the appointment of a curator to a person absent on public duty as to any other person.

In 12th La. the Court declared: "That previous to the promulgation of the Louisiana Code and Code of Practice, the appointment of a curator *ad hoc* to an absentee was not authorized by law. But our present Codes seem to have provided for all cases in which absent persons may be interested, or in which rights are to be exercised by or against them, whether domiciliated in or out of the State."

The interpretation thus given by the Court to the term "absentee," has been steadily adhered to ever since 1825. I refer to the cases in the Reports, some of which are selected and cited by my colleague in his brief for an unbroken current of authority upon this point, running down even to the case in which this Court has decided upon a similar question, that Charles M. Conrad, whose domicile was in New Orleans, but who was a representative from this State in the House of Representatives of the late so-called Confederate States, was to be considered an absentee from the State, and as such entitled to appeal from a judgment against him at any time within two years after it became final in the Court below. *Lambert v. Conrad*, 18 A. 145.

Montgomery, then, was clearly an absentee, and the plaintiff had a right to cause him to be represented by a curator *ad hoc*. Nor is this right in any way affected by the fact, that the plaintiff apparently endeavored at first to bring Montgomery into Court by the ordinary means of citation.

The law has not provided for the manner in which the absence of a defendant must be proved, in order to justify the appointment of a curator *ad hoc*, but wisely leaves it to the discretion of the Court authorized to make the appointment. The 57th Article of the Civil Code merely declares, "that the Judge shall appoint a curator *ad hoc*, to defend the absentee;" and the 116th Article of the Code of Practice, "that a curator *ad hoc* be named to defend the suit."

The practice in the Courts has been for the Judge to appoint a curator, either upon the return of the sheriff, showing the absence of the defendant, or upon the oath of the plaintiff himself, or of a third party, and even of the plaintiff's son, (who is, under the general law, incompetent to testify in any manner in which his parent is concerned) to the absence of the defendant, and sometimes upon a mere suggestion unsupported by oath.



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In the case of Livingston, the curator was appointed on the sheriff's return. In the case of Ferguson, the curator was appointed upon the statement in the petition. In the case of Cooley, 9th La. p. 78, upon the oath of the plaintiff's son.

In the present case, the absence of the defendant was suggested by the plaintiff in the petition praying for the appointment of a curator, was supported by the return of the sheriff, a sworn officer of the Court; is distinctly admitted to be true by the defendant himself in his petition of appeal, and is placed beyond the possibility of a doubt by the other evidence in the record. It is equally well established, that the defendant and his family were absent from and resided out of the State; had no domicile here, and no agent authorized to defend him in Court, as I will hereafter demonstrate. It is clear, then, that this is a case in which the appointment of a curator *ad hoc* was absolutely necessary, and that the Judge acted wisely in making an appointment, and, I may add, in the selection of the individual appointed, a member of the bar, of integrity, and attentive to every interest entrusted to him.

Under our law, the appointment of a curator *ad hoc* to an absent defendant, authorizes the service of all requisite notices in the case to be made upon the curator, with whom the suit must be carried on contradictorily until the final judgment. In 4th La., Judge Mathews said: "Defendant being absent could not be cited in the ordinary mode prescribed by law, and the curator may be supposed to supply the place of citation." In the 5th La. 489, Judge Porter said: "That the curator was enabled, after his appointment, to answer to the petition and to act for the defendant, and that it could not be considered an objection to the regularity of the cause." In 9th La. 77, Judge Martin said: "As the curator *ad hoc* is the person against whom the proceedings are to be conducted contradictorily between him and the plaintiff, it follows, as a consequence therefrom, that upon him the citation is to be served; and the construction which would require the previous citation of the party, would be the cursed one, which corrodes and destroys the text." I need not cite further authorities on this point, for it is an established principle invariably recognized by our Courts. When then the defendant says, that there was "no citation," and "*no contestatio litis*" in the case, I point to the record before the Court; to the appointment of the curator, and the proceedings had prior to his appointment; to the sheriff's return, establishing the service of the petition and citation upon him, to the answer of the curator to the petition; to his appearance in the Court contradictorily with the plaintiff, on the trial of the cause, and to the judgment rendered in the Court *a quo*; as conclusive proof that there was a "citation" and "*a contestatio litis*," such as the law demands to legalize the judgment.

I pause here for the present for the purpose of collecting the links in the defendant's argument that I have examined, and of exposing their true condition as I place them before the Court.

He appears in this Court as an absentee from the State, claiming the right of appeal from a final judgment against him, rendered nineteen months prior to his petition for the appeal; and at the same time he con-

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tends that he was not an absentee, and is entitled to the benefit of laws passed for residents only. \* \* \*

I think I have now shown that every link of defendant's argument, upon the first and main point on which he asks that the judgment in this case be set aside, is defective and imperfect, cracked and flawed, and must be condemned and rejected by the Court.

The second ground on which defendant asks that the judgment be set aside, is:

Second. "The petition of the plaintiff, and one of the acts of mortgage making part of it, show that P. E. Bonford, a resident of New Orleans, was the agent and attorney in fact of the defendant. The appointment of a curator *ad hoc*, therefore, was not warranted by law."

Upon this point my colleague has said: "The name and life of P. E. Bonford belong to the history of the late war, and the part that Louisiana took in that conflict.

All writers on evidence agree that historical facts need not be proved, and upon this principle I am authorized to state that it is well known that the lamented Mr. Bonford espoused the cause of secession with great zeal; that he left New Orleans in April, 1862, when the Federal forces arrived here; that he linked his fortune to that of the Confederacy; that he was made a Judge of the Supreme Court organized by Governor Allen, the then Governor of that portion of the State which was then in rebellion against the United States, and died in the Confederate lines. It was impossible, therefore, to serve citation on him, even if he was empowered to represent the defendant, which is denied."

The power of attorney given to Mr. Bonford, was limited and specific. It is not shown to have been such as to authorize him to represent Montgomery in Court, and to allow legal proceedings to be carried on under it, contradictorily with him so as to bind Montgomery. He could not, therefore, be legally cited. 9 L. 77.

It is unnecessary to add anything to this. I pass, therefore, to the third ground on which the defendant asks that the judgment be set aside, namely:

Third. The judgment must be restricted in its operations exclusively to the property mortgaged, beyond which it can have no effect, and can possess none of the attributes of a judgment *in personam*.

I concur entirely in the proposition. Before I bring to the notice of the Court the authorities with which I desire to close this argument, there is one circumstance which has continually presented itself to my mind, in the consideration of this case, and which I have no doubt has suggested itself to the Court, upon which I will say a few words. If the defendant was only temporarily absent from the State; if he really had a domicile in it; if he had any person there on whom citation could be served; and if he thought all or any of these facts would be of service to him in annulling the judgment of which he complains, and had any proof to establish them; why did he not proceed by an action of nullity, and produce, or offer to produce testimony to prove the facts? Upon his theory of the law—a theory which we deny, and have shown to be incorrect—what would have been easier than for him (if his assertions be true) to bring forward his witnesses, and prove them? His failure t

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attempt this can only be ascribed to the fact, that he knew the plaintiff would disprove every one of his assertions; and that, therefore, even with his theory of the case, it was wiser for him to rely upon vague intimations, the supposed absence of proofs of the negative and bold assumptions, than to meet the plaintiff upon the fair and equal ground of legal proof.

And now I submit the authorities to which I have alluded. They point out the course that ought to be pursued by creditors in cases like the present, and show that the plaintiff has pursued precisely that course, and that the judgment rendered in his favor is valid in law, as it undoubtedly is founded on justice.

The defendant, indeed, does not pretend that he did not owe the debt for which the judgment was rendered; on the contrary, he himself gave the confession of judgment that it was due. He does not pretend that he has been deprived of any means of defence; on the contrary, he admits that he had no defence. He cannot pretend that the suit was brought with greedy and oppressive haste; on the contrary, he is obliged to admit that the plaintiff waited two full years after the debt was due, before he instituted his action. The only ground on which he hopes to succeed, is one of mere sheer, dry technicality. Delusive hope! The law combines with equity in upholding the judgment of the defendant. But to the cases.

In *Millaudon v. Beuzley*, 2d An. 960, the plaintiff sued upon two promissory notes, secured by a special mortgage. The defendant being an absentee, a curator *ad hoc* was appointed to represent him. It was objected, that the defendant could not be brought into Court by a curator *ad hoc*. The Supreme Court said: The defendant owned property in the State, which was specially mortgaged to secure the plaintiff's claim, and in such cases our laws expressly permit absentees to be proceeded against judicially, upon being represented by a curator *ad hoc*. C. C. 57; C. P. 116. \* \* \*

*Brief of E. Filleul—Additional brief of plaintiff and appellee.*—The appellant having filed his brief on the very day fixed for the argument of this case, it was impossible for the appellee to answer to the points made for the first time on appeal.

The appellee will, therefore, beg leave of the Court to file additional argument in answer to the appellant.

The theory upon which the appellant bases his hopes of success is, that the plaintiff's action is a personal action, and that such an action cannot be prosecuted, unless the defendant be served with process of citation according to the Arts. 189, 190, that is, personally, or at his domicile. The appellant argues also *en désespoir de cause*, that the appointment of a curator *ad hoc* was unauthorized, and the service of citation should have been made at the last domicile of the defendant, according to Article 167 C. P., while there is not in the whole record an *iota* of evidence to bring him within the operation of that Article, 167 C. P.

The defendant did not prove, and does not allege, that if citation had been left at his last domicile, it would have reached him, nor do the circumstances of this case tend to prove that he had removed within a short

*radius* in the same parish, or a neighboring one, where he could have repaired to the old domicile, or where the information that a suit instituted against him could have reached him. But let us remark that this Article 167, C. P., was not enacted with a view of conferring any privileges on the defendant, but *in odio debitoris dolosi*; that, therefore, it would be difficult to imagine a case where this Article would operate in favor of one whose conduct has been the cause of uncertainty about his real domicile.

It is an easy task to show the fallacy of the premises, upon which the appellant rests his reasoning, and draws his conclusions. If his premises are wrong, his conclusions must be wrong, because in logic, correct and true conclusions and consequences can never flow from wrong premises.

And first. What is the nature of the action? The record shows that it is a suit to foreclose a mortgage, to subject real property to the satisfaction of a mortgage.

This is the highest and purest type of the real action, and the one always quoted by illustration or example of a definition of the real action. "L'action est réelle, parcequ'elle émane du droit que nous avons sur une chose. Ex jure quod quis in re habet profiscitur actio in rem et peu importe quel soit le droit; domaine directe ou utile usufruit servitude ou gage." Encyclopedie, Verbo Actions. Article de Mr. Marie.

This definition of the real action is the same in the Louisiana Code of Practice. Arts. 41, 42.

Article 61, C. P., says: That an hypothecary action is a real action, which the creditor brings against the property which has been hypothecated to him by his debtor in order to have it seized and sold for the payment of his debts. See also Arts. 62, 63.

This is the action which has been instituted by the plaintiff. According to Article 63, C. P., the plaintiff having a title importing a confession of judgment, could have demanded that the property mortgaged to him should be seized and sold immediately.

Instead of resorting directly to this summary proceeding, showing more leniency to his debtor, the plaintiff proceeded *via ordinaria*. It is with a bad grace that objection is made to this form of proceeding by the appellant, but the objection is of no avail, because all civil actions may be prosecuted *via ordinaria*, C. P., 95 to 98.

The form of proceeding does not change the character or the nature of the action, and a real action prosecuted *via ordinaria* preserves its character of real action, just as much as if it was prosecuted in an executory or summary way.

Those premises being well established, let us examine what steps were taken to bring the property of the defendant into Court, and to have it seized and sold by the sheriff to satisfy the mortgage of the plaintiff.

In the first place, in the body of the petition, he could have suggested to the Court that the defendant was absent, and upon this bare suggestion the Court, in the exercise of a wise and sound discretion, could have legally appointed a curator *ad hoc*, to represent the absent defendant.

We know perfectly well that this suggestion is usually verified by the oath of the plaintiff, or by some other preliminary showing, but we do not consider it essential, because it is not written in the Article 116 of the Code of Practice, and Article 57 of the Civil Code—which are the

only fountains and sources from which is derived the right of the Court to appoint curators *ad hoc* to absent defendants. (See arguments of the original brief.) In the case of *Cooley v. Seymour*, 9 L. R. p. 78. The suggestion to appoint the curator *ad hoc* was supported by the oath of the son of the plaintiff.

The oath of a plaintiff's son is certainly entitled to no more weight and value than a mere suggestion of the plaintiff himself. The Supreme Court paid no attention to the objection raised in that case, and considered that by appointing the curator *ad hoc*, the Court had wisely used its discretion.

My conviction is irresistible that it is so ; because the co-relative of Art. 57, C. C. and 116 C. P. are found in Arts. 267, 268, 614 C. P., which give the right to the absent defendant of annulling the judgment rendered against him, upon proving that the allegations of the plaintiff were untrue. It was a right of which the defendant could have availed himself. But as he has not done so, we have the right to assert that he did not do so, because he knew that all our allegations are true, and that we could prove them to be so at any time.

The plaintiff, by an excess of precaution, (this case being an important one) thought that it would be better to prove beyond a doubt, the absence of the defendant, and the impossibility of serving any citation on him, either personally or constructively. He, therefore, resorted to the best and highest mode of proving the absence of the defendant.

On the 9th November, 1863, he placed the citation and petition in the hands of the sheriff, and on the 18th, he obtained what he thought the highest evidence of the defendant's absence, in the sheriff's return in these words : "After diligent search and inquiry, the defendant could not be found, and I learned that he was out of the State." If the sheriff of the parish who is acquainted, or is presumed by law to be acquainted with every resident of the territory of his jurisdiction, who summons all jurymen, attends at all the State elections, and summoning all the witnesses before all the Courts of his territorial sheriffalty, after diligent search and inquiry for nine days, has been unable to find in the city of New Orleans, a man who had mortgaged his real estate property for upwards of \$16,000, in gold, who belongs to one of the most ancient and wealthiest families of the city. That if the said sheriff was unable to find out his last domicile, the plaintiff had certainly acquired the right and conscience to say that the utmost diligence had been used, and the Judge about to exercise a wise discretion, could certainly rest at peace at night, and when laying his head on his pillow, he might with satisfaction, say that he certainly had not wronged the defendant in appointing a curator *ad hoc* to represent him and his property ; that he certainly was truly absent, and that there was nobody in charge of his property ; and, that if there was a chance to use this discretion, and appoint a curator *ad hoc*—this was the very case which the legislator, no doubt, had in contemplation.

But, supposing that the defendant had a last domicile, an expression which is almost without meaning by the difficulty of understanding what ideas it conveys, what relations there are between the person and the last



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domicile, and how long, and when, and how a person preserves his last domicile. The service could not have been made at this last domicile, as Your Honors will see by the following decisions: I must remark that the privilege of citing a defendant at his last domicile is given by law to the plaintiff, for the purpose of punishing cunning or fraudulent debtors who avoid the suits of their creditors, and that it is strange, and passing strange, that a party who puts obstacles in the way of his creditors, should reap any benefit of his misconduct, and of a state of uncertainty created by himself to prevent the legitimate prosecution of his creditor's claim, and should use as a weapon the shield and sword which the law has put on the body and in the hands of his opponent. See C. P. 187, and C. C. Article 42.

In logic and in law, a man has but one domicile, and the citation must be left at that domicile, when it is not served personally. C. C., Articles 189, 190.

In November, 1863, the defendant had no domicile in New Orleans; he had left it a long time before; he was residing out of the State with his wife, and we are going to prove it, and prove it by authentic act and by record. And though the sheriff's return is not attacked, we will render it unassailable. \* \* \*

The extravagant value affixed by the defendant to the property mortgaged by him is not proved by the record; we will manifest our respect for the Court, in not answering to this strange and disrespectful allegation; we are convinced that the Court will not consider anything upon which issue has not been fairly joined as proved by the record.

*Brief of W. H. Hunt, for defendant and appellant.*—On the 10th of November, 1863, Henry Samory instituted a personal action in the Third District Court against Samuel M. Montgomery, a resident of New Orleans, to recover—first, the sum of \$15,640, exclusive of costs and interest, the amount of four promissory notes, drawn by the defendant to his own order, and by him endorsed; three of \$5,000 each, dated New Orleans, 24th of May, 1861, and payable six months after date, and the other for the sum of \$640, drawn by the defendant to his own order, and by him endorsed, through his agent, F. E. Bonford, dated New Orleans, January 13th, 1862, and payable twelve months after date; and second, another sum of \$782, for attorney's fees. These four notes were secured by mortgage, by public acts passed before Edward Barnett, Notary Public, on May 28th, 1861, and 13th January, 1862, on a certain lot of ground, with the buildings and improvements thereon, in this city, forming the corner of Camp and Common streets. The plaintiff prayed that the defendant be cited to appear and answer, and that after legal delay and due proceedings had, he be condemned to pay the amounts claimed, with mortgage and privilege on this property.

Citation issued, addressed to the defendant, and was returned by the sheriff on the 18th November, with this endorsement: "After diligent search and enquiry made, S. McCutcheon Montgomery could not be found, and I learned that he was out of the State."

The plaintiff, on the return of this citation, filed a supplemental petition, praying the Court to appoint a curator *ad hoc* to represent the

defendant, and that he might be cited through such curator *ad hoc*. The Court appointed a curator *ad hoc*, who filed for answer a general denial. The cause was tried, and a personal judgment was rendered against the defendant for the amount of the plaintiff's claim, with privilege on the property mortgaged.

The plaintiff, thereupon, caused a *feri facias* to issue on the judgment, and the mortgaged property was seized and sold by the sheriff, on the 5th February, 1864, and adjudicated to the plaintiff for the sum of \$14,000.

The defendant has appealed, and now asks that the judgment and sale be set aside, on the following grounds :

First. This is an action *in personam*. The petition and the notarial acts annexed to it, show that the defendant was a resident of New Orleans. The returns of the sheriff, on the citation, do not show that the defendant had changed his place of residence by departing permanently from the State. The petition and citation should, therefore, have been served at the domicile of the defendant, as directed by the Code of Practice, Arts. 189 and 190 ; and the appointment of a curator *ad hoc* was not warranted by law, under the circumstances.

The correctness of the judgment appealed from is to be determined upon the evidence in the record. The plaintiff having obtained, without legal citation, as the appellant contends, a judgment against the defendant, caused his property, worth to-day some \$70,000, to be seized and sold by the sheriff, and bought it in for only \$14,000. It is but natural that, under such circumstances of hardship, the defendant should ask the Court to scrutinize closely the legality of the means by which he is sought to be subjected to a sacrifice so ruinous to himself, and so highly advantageous to his creditor.

It is to be borne in mind that this is not an executory proceeding, or an action *in rem*, but an action *in personam*. The judgment of the Court *a quo* is against the defendant for the amount of the notes and attorney's fees sued for.

The plaintiff's petition and the notarial acts annexed to it, establish the fact that the defendant was a resident of New Orleans. The answer of the curator *ad hoc* does not contradict the fact. The citation was addressed to the defendant in person. The return of the sheriff, upon the citation, constitutes the only evidence on which the right to have the defendant represented by a curator *ad hoc*, depends.

The plainest principles of law and justice require that every man should have a full opportunity of being heard in his defence, when suit is brought against him. This opportunity can only be afforded by giving him notice of such suit. This notice the law requires to be given by the service of citation upon him. Such service may be actual or constructive. If service be made personally upon the party, he has received actual notice. But "when, from certain facts the law implies notice in judicial proceedings, they must all concur, in order to establish such constructive notice." 16 La. 596.

These principles are obviously wise and just. They are established by textual provisions in our law, and in an unbroken series of decisions from the earliest days of our jurisprudence down to the present time.

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A careful examination of this return shows nothing to warrant the presumption, that the defendant had left the State permanently, or was an absentee in the meaning of the law. The term absentee "embraces a person who has resided in the State, and has departed without leaving any one to represent him. It means, also, the person who never was domiciliated in the State, and resides abroad." C. C., Art. 3522, No. 3. The Code thus declares a person an absentee, only when he has abandoned his domicile in this State, with the intention of not returning within any definite period; and, evidently, does not mean that a party temporarily absent from home, even though out of the State, has abandoned his residence in this State, and become in legal acceptance, an absentee. If a different construction be placed on the provisions of the law, the most unjust and ruinous consequences would flow from it. Any citizen, whose footsteps lead him, by chance or design, to cross the boundaries of Louisiana, even for a day, would then become an absentee, whose property would be liable to attachment, and whose interests would be committed to the mere formal protection of a curator *ad hoc*. The sheriff's return, in this case, does not state that he had learned that the defendant had permanently left the State, but merely that he "learned he was out of the State." If he was out of the State, he may have been temporarily absent, as proves to have been the case, and citation should have been served at his domicile, to which it appears he has since returned.

In the case of *Brown v. Trent*, 12 L. 603, the defendant was sued as a citizen of the parish of Ouachita, where he had his domicile. At the time the notice of judgment was served, he had removed, either temporarily or permanently from the State. The Court decided: "If the absence was temporary, he certainly has not lost his domicile; and if permanent, the house in which he last lived, is the one where the citation should be served."

In the case of *Sparks v. Weatherby*, 16 L. 595, the Court said: "When there has been no personal service of a citation, its want can be supplied only by pursuing strictly the provisions of law, which substitute for it any other species of service. The Code of Practice, Art. 189, requires that "service must be made, by leaving copies of the citation and petition at the usual place of domicile or residence of the defendant; if he be absent, by delivering them to a free person, apparently above the age of fourteen years, living in the house." \* \* \* The expressions, in the above article, evidently contemplate a temporary absence; and the provision itself is based on the presumption, that the party sued will receive intelligence from citation being made where he usually resides."

A change of domicile must be shown by express and positive evidence. So long as any reasonable doubt remains, the legal presumption is against such change. In the case of *Cole v. Lucas*, it was decided that a domicile once acquired remains until a new one is acquired, "*facto et animo*." One going to another State for health, pleasure or any temporary purpose, with the intention of returning, has a mere transitory residence, which constitutes no new domicile, nor an abandonment of the old one. It is not the act of inhabitation which constitutes the domicile, but the fact,

coupled with the intention of remaining. In case of doubt, the original domicile is considered to be the true one. 2 An. 946.

The Code of Practice provides that citation and petition may be served by being delivered to the defendant in person, or by being left at his domicile. Art. 187.

The service is made in person, when the citation and petition are delivered to the defendant himself, Art. 188.

It is made at the domicile, when copies of the citation and petition are left at the usual place of domicile or residence of the defendant, if he be absent, by delivering them to a free person, apparently above the age of fourteen years, living in the house. Art. 189.

The petition and citation must be served on the defendant in person, or left at his domicile, in the manner provided in the two preceding articles, in all cases, where the defendant is of age, enjoys civil rights, is present in the place, or has there his acknowledged domicile or residence. Article 190.

The plaintiff's petition, and the notarial records annexed, show clearly, as already seen, that the acknowledged residence of the defendant was in New Orleans. He, therefore, should have been served at that acknowledged residence, as the Code of Practice requires.

In the case of *Collins v. Walling*, 6 An. p. 702, the Court decided the return of the sheriff should, on all occasions, follow substantially the words of the Code of Practice. The sheriff's return on the citation, that he "learned the defendant was out of the State," without adding he had left the State permanently, is not a substantial compliance with the Code of Practice, and did not entitle the plaintiff to have a curator *ad hoc* appointed to represent the defendant. In every case in which a curator *ad hoc* has been legally appointed, satisfactory evidence was produced that the defendant was either a non-resident, or had left the State permanently, without leaving any one to represent him. The judgment, therefore, is a nullity, for the want of proper citation of the defendant.

Second. The petition of the plaintiff, and one of the acts of mortgage making part of it, show that P. E. Bonford, a resident of New Orleans, was the agent and attorney in fact of the defendant.

Article 196 of the Code of Practice, requires that if the person absent has an attorney in fact, whose name appear in the petition, the sheriff shall serve the same on that attorney in fact, in person, or at his domicile. There is no evidence in the record showing that any effort was made by the sheriff to find P. E. Bonford, or that he had left the State permanently, so that he could not be cited. The plaintiff was, therefore, guilty of laches, in not requiring the sheriff to serve the citation upon the attorney in fact.

In the case of *Cooley v. Seymour*, 9 L. 276, the sheriff returned that the appellee was out of the State. This case was not decided on the sheriff's return, the appellant having furnished proof by his affidavit, that the appellee resided in Philadelphia. But Judge Martin, in commenting on the sheriff's return, said: "The affidavit, that the appellee resided in Philadelphia, prevented the objection that might be made to the service of citation, as evidence by the sheriff's return of the absence of the

appellee, which, if occasional only, does not dispense with a citation at his domicile."

The appointment of a curator *ad hoc* to represent the defendant, who, in his absence, had been represented by an attorney in fact, a resident of New Orleans, was not warranted by law, under the circumstances; and there having been no *contestatio litis*, the judgment is a nullity.

Third. The judgment rendered in this case, if not a nullity, must be restricted in its operations exclusively to the property mortgaged, beyond which it can have no effect, and can possess none of the attributes of a judgment *in personam*.

In the case of *Thayer et al. v. Tudor*, 2 An. 1010, the plaintiff, a resident of Boston, instituted suit against the defendant, also a resident of Boston, to secure the amount of two mortgaged notes. A curator *ad hoc* was appointed to represent the defendant, and a personal judgment rendered against him for the amount of the notes. The Supreme Court decided that a judgment rendered against the defendant can have no effect beyond the property mortgaged. See also the case of *George, Curator, etc., v. Le Grand*, 3 An. 652.

In both these cases, there was evidence that the defendants resided permanently out of the State. But in the case now before the Court, there is no such evidence. On the contrary, it is shown that the defendant was a resident of New Orleans, and had an attorney in fact, who was also a resident of New Orleans; and the return of the sheriff, that he learned that the defendant was out of the State, is not proof that he had left the State permanently, is altogether consistent with the fact of his temporary absence, and did not entitle the plaintiff to have a curator *ad hoc* appointed to represent him.

TALIAFERRO, J. In November, 1863, the plaintiff filed this suit against the defendant, alleging a large amount of indebtedness by him to the plaintiff, as owner and holder of five promissory notes, secured by mortgage on a house and lot in the city of New Orleans. The plaintiff had judgment in his favor for the amount claimed, with recognition of the lien and privilege on the mortgage property described in the petition, and copies of the mortgages adduced in evidence. Judgment was rendered on the 8th of December, 1863. On the 15th July, 1865, the defendant obtained an order of appeal. He urges as irregularities in the proceedings, that having his domicile in New Orleans, he was entitled to personal citation; that although absent at the time, that absence was only temporary, and that he was not an absentee of that kind, which, in legal contemplation, a creditor is authorized to proceed against by causing a curator *ad hoc* to be appointed. He further contends, that he had an agent in New Orleans, whose name appeared in the petition, and that no copy of petition or of citation was served on the agent.

The plaintiff proceeded *via ordinaria*. A citation was issued, and the sheriff made return, "that after diligent search and enquiry made, Samuel McCutcheon Montgomery could not be found, and I learned that he was out of the State."

The plaintiff then, by supplemental petition, prayed for and obtained the appointment of a curator *ad hoc* to represent the defendant, and obtained against him so represented, the judgment complained against.



The facts appear to be that Montgomery, the defendant, left New Orleans in 1861, or at least that he was absent in January, 1862, and there is nothing making it probable that he returned before the summer of 1865.

He was absent with his wife in the State of Virginia, during the greater part of this time. We find no act of procuration in the record from the defendant to P. E. Bonford, who acted in the capacity of agent or attorney in fact for defendant and wife, in the execution of the second mortgage to the plaintiff in January, 1862. Bonford was a Judge of the Supreme Court of the State at or soon after that time, under the appointment of Henry W. Allen, acting as Governor under Confederate rule. The probability is, that he was absent from New Orleans after the capture of the city in April, 1862, by the Federal forces.

The act of mortgage executed by him in January, 1862, recites that Bonford was the "agent and attorney in fact of Montgomery." We are not authorized to infer that his powers were sufficient to enable him to defend suits, or to authorize the service of citation upon him. It is sufficiently clear, that at the time the plaintiff's suit was filed, in 1863, Montgomery had no agent in New Orleans upon whom citation could be served, or against whom, as the representative of Montgomery, legal proceedings could have been carried on.

The only question in this case is, was Montgomery at the time this suit was instituted an absentee in legal contemplation, to whom a curator *ad hoc* might be appointed, and contradictorily with whom a suit might be prosecuted, and a valid judgment obtained against the absent person.

If the term absentee can only be applied to persons who never had a domicile in the State, or, who having had a domicile in the State, has left it permanently, and lives permanently beyond its limits, it is plain that such a construction of the term would operate injurious and vexatious delays to creditors seeking to enforce claims against their debtors. On the other hand, not every casual and temporary excursion of a resident from the State can convert him into an absentee, and render him liable to be harassed by his creditor, who, to gratify improper feelings, might resort to unnecessary acts to injure him. But, where in a case like the present, the debtor is absent two or three years, has property in the State, but who leaves no housekeeper or person upon whom a citation can be served, has no agent to represent him, it would be leaving him a large margin for the procrastination of payment of his debts to permit him, under such circumstances, to plead that he had a domicile in the State, and argue his right to personal citation, when, for so long a period, he was absent, and had left no person upon whom such citation could be served. We think such a perversion of terms inadmissible.

That the appointment of a curator *ad hoc*, in a case like the present, is clearly within the scope and intendment of our law, there can be no doubt. Neither is it in conflict with the spirit of our jurisprudence. The defendant refers to the case of *Cole v. Lucas*, 2 An. 950, on the subject of domicile. Chief Justice Eustis, in that case, said: "A person going to another State for health, for pleasure, or any temporary purpose, with the intention to return, has a mere transitory residence which constitutes no new domicile, nor an abandonment of the old one." The facts of this

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case, as well as those of 16 L. 595, and those of 12 L. 603, also quoted by defendant's counsel, as relates to the circumstances and character of the absence, differ widely from those of the one under consideration. Montgomery left New Orleans, it seems in the year 1861, during the war. It is shown that his family left here also ; that they resided in Virginia ; there is no evidence showing an intention to return. He was engaged in war ; he might not survive the perils of war. The city of his former domicile was in possession of the United States military forces. He might not desire to return. Taking the whole range of circumstances attending his absence, we think the case very different from that of a person absent a short time for health, pleasure or some temporary purpose, with the known intention to return.

If the defendant had a domicile in and resided in the State, he had no right to an appeal, for the time had elapsed within which he was entitled to appeal.

How he could be an absentee to entitle him to two years to take an appeal, and at the same time claim to be personally cited, seems to present some incongruity.

The case of Mr. Livingston, 6 N. S. 15, referred to by plaintiff's counsel, shows that the appointment of a curator *ad hoc* might be made to represent a person absent temporarily on public business, when he had left no agent upon whom process could be served.

In 12 L. page 604, it was laid down that "previous to the promulgation of the Louisiana Code and the Code of Practice, the appointment of a curator *ad hoc* to an absentee was not authorized by law. But our present Codes seem to have provided for all cases in which absent persons may be interested, or in which rights are to be exercised against them, whether domiciliated in or out of the State." This seems to have been the practice heretofore generally adopted.

The case of *Dupuy v. Hunt*, in 2d Annual, made no innovation upon this practice. It simply settled that the absentee must have property in the State upon which the action of the Courts could take effect, and that judgments rendered against absentees had no effect beyond the property proceeded against.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts. 14 L. 447. 15 L. 81. 2 An. 634. 6 Rob. 189. 13 An. 505. 18 An. 145.

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No. 1263.—ASHFORD ADDISON, Dative Testamentary Executor, v. PAULINE SELTOON et als.

The doctrine in the case of *Wainwright, Administrator, v. Bridges*, (ante page 234) reaffirmed.

**A** PPEAL from the District Court, Parish of Livingston, *Ellis, J.*  
*Wilson & Pipkin*, for plaintiff. *Ellis & Addison*, for defendant.

Addison v. Seltoon et als.

**TALIAFERRO, J.** This suit is founded upon a promissory note, executed by the defendant, Pauline R. Seltoon, a married woman, as principal, and Kemp and Carter, the other two defendants, as sureties, in favor of the testamentary executor of the succession of George W. Watterson, deceased, for thirteen hundred and fifty dollars, due 24th of November, 1861, and bearing interest from that time, at the rate of eight per cent. per annum. The defence is, that the note was given for the price of a slave purchased by Mrs. Seltoon, at a probate sale of property of the succession of George W. Watterson, deceased, in November, 1860; that there is an entire failure of consideration for which the obligation was entered into, arising from the emancipation of slaves by the government; that the plaintiff, having warranted the slave purchased a slave for life, cannot in equity and good conscience require payment of the note sued upon. It is further set up in defence, that the note was executed by the wife without the authority of her husband, and is therefore null; and lastly, it is urged that the required United States revenue stamps have not been affixed to the note as prescribed by act of Congress, and that the plaintiff cannot enforce the payment of the note on that account.

The plaintiff had judgment, and defendant appealed.

The defence must prevail. It was held by this Court, in the case of *Wainwright, Administrator, v. Bridges*, recently decided, that Courts are without power to enforce obligations, the consideration of which was the price of slaves. In this case it is fully shown, that the note sued upon was given in consideration of a sale of that kind.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; it is further ordered, that judgment be rendered in favor of the defendants, releasing them from the obligation sued upon, the plaintiff and appellee paying costs in both courts.

Justices LABAUVE and ILSLEY dissenting.

For the reasons given in our dissenting opinion, in the case of *Wainwright, Administrator, v. Bridges*, we dissent in this case.

JOHN H. ILSLEY,

Associate Justice of the Supreme Court.

ZENON LABAUVE,

Associate Justice.

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No. 393.—N. E. WRIGHT v. R. C. CUMMINGS et als.

A purchaser at probate sale is not required to look beyond the decree recognizing its necessity.

Article 990 of the Code of Practice, does not imperatively require the preliminary offering of succession property for sale for cash; it may be offered at first sale on credit, when it appears to be to the interest of all parties concerned, and none except those having an interest in the sale of the property can complain.

The recording of a process-verbal of sale, in the parish where the property lies, is notice to third parties. The omission to record it in the parish where the succession is opened, will not operate a nullity of the sale.

**A**PPPEAL from the District Court, Parish of Caddo, *Jones, J.*  
*James W. Duncan*, for appellant. *L. M. Nutt* and *J. C. Beall*, for appellees.

Wright v. Cummings.

*Reporter.*—The appeal in this case was made returnable to the Supreme Court, at Natchitoches, at the August term, 1866. By the following agreement of counsel, the case was taken to New Orleans and decided.

N. E. WRIGHT,  
v.  
R. C. CUMMINGS et als.

*In the Supreme Court of Louisiana.*

The above-entitled case having been submitted on brief, it is hereby agreed that the same may be decided either at the approaching session of this Honorable Court, to be held at Opelousas or in New Orleans, at Chambers, as the Judges may deem fit, reserving to either party the right to apply for a rehearing at any time within thirty days after he shall have ascertained the rendition of the judgment, or notice given by the clerk of the Supreme or District Court.

JAS. W. DUNCAN,

Attorney for Appellant,

Caddo Parish.

NUTT & LEONARD,

for defendants and appellees.

TALIAFERRO, J. The plaintiff sues for a tract of land lying in the parish of Bossier. His averments of title are 1st: A deed from Ann Schenick, widow of Abner Schenick, deceased, and surviving mother of the only child of their marriage. 2d. United States patents to Abner Schenick.

The defendants claim, by purchase from J. B. Gilmor, who bought the land at a probate sale of the property of Abner Schenick's estate. In the lower Court judgment was rendered in favor of the defendants, and the plaintiff has appealed.

This suit was commenced in 1860, in the parish of Bossier, and after some proceedings had there, it was by agreement of parties transferred to the parish of Caddo.

Abner Schenick's succession was opened in the parish of Caddo, in the year 1844. An administrator was regularly appointed in September of that year, and inventories were taken in the parishes of Bossier and Caddo.

The administrator caused all the property of the succession to be sold, and filed a tableau of debts on the 21st of October, 1846.

The plaintiff attacks the probate proceedings throughout, and alleges numerous illegalities in the administration of the estate. In an amended petition, he avers that Schenick's succession was opened in the parish of Bossier, and avers the nullity of the administration in Caddo. He has adduced no evidence to support the allegations of the amended answer, and seems to have abandoned them.

It will not be necessary to examine objections taken to the proceedings prior to the date of the order of sale. A purchaser at a probate sale is not required to look beyond the decree recognizing its necessity. 13 L. 434. 14 L. 146. 7 Rob 66. 2 An 468.

We find that the administrator filed a petition in the proper Court, setting forth that there was land belonging to the estate, in the parish of Bossier, which had been previously inventoried; that it was necessary to sell the land, in order to enable him to pay the debts of the succession,

and he prayed an order of sale of the land to be made on a credit of twelve months, the purchaser to be required to give the usual security for the payment of the price. An order was rendered on the 9th of November, 1844, as prayed for. The tableau of debts filed in October, 1846, shows clearly that the estate was insolvent, and that the necessity for the sale of the land did exist at the time the sale was invoked. The plaintiff alleges that no commission issued from the parish of Caddo, authorizing the sale of the land in Bossier; that the land was sold under an order of the Court of probates of the parish of Bossier, which had not jurisdiction; that no return of a *proces-verbal* of sale was made to the parish of Caddo. The *proces-verbal* of a sale by the probate Judge of Bossier commences with the usual caption, "State of Louisiana, parish of Bossier," and recites that sale was made of the land pursuant to an order and decree of the Court of probates in and for *said parish*.

A scrutiny of the record of the proceedings satisfies us that this was a mere clerical error. It is clear that the succession was opened in Caddo, although, unadvisedly, no doubt some incipient proceedings were had, as already remarked, in Bossier, yet by consent they were transferred to Caddo, and this was done before an administration had been taken out. The plaintiff appears to have erroneously instituted this suit in Bossier, his petition and amended petition being addressed to the probate Court of Bossier, and this is all that was done there in this case, except the taking of the inventory and the making of the sale. The entire proceedings, with these exceptions, were carried on in the parish of Caddo. The *proces-verbal* of the taking of the inventory in Bossier, on the 23d October, 1844, recites that it was made under an order from the parish of Caddo.

It is not shown that any petition for an order of sale of the land in question was ever presented to the probate Court of Bossier, nor that an order of that Court was ever rendered for such sale. Doubtless, no such petition was ever presented or such order granted. We find in the bill of costs of the clerk of the parish of Caddo against the estate, charges for two commissions. Against the date of September 3d, 1844, is the item "commission to Bossier." This is evidently the commission for making inventory and appraisement of the land in Bossier. The *proces-verbal* of the making inventory there is dated October 23d, 1844. Afterwards, against the date of 20th October, same year, is the item "Commission to Bossier," and the *proces-verbal* of sale is dated 3d January, 1845. These are the only charges in the bill of fees for commissions, and it is manifest that none others were ever issued. The intervals of time that elapsed between the date of the orders and their execution, taken with the other facts, render the conclusion satisfactory, that the recital in the deed referred to, was a clerical error, and one that might easily be made.

The objection that the order of sale directed the land to be sold on a credit of twelve months, without requiring it to be first offered for cash, we consider to be of no weight. Creditors have the right to require the sale of succession property to be made for cash, if their debts are due, provided it bring its appraised value. Code of Practice, 990. But this is optional with them. But here, creditors are not complaining; neither is it shown that any injury has resulted from the administrator's



having taken his order for a sale on twelve months' credit, without asking for the preliminary act of offering the property for sale for cash. The presumption is rather in favor of his having done an act beneficial rather than injurious to all parties concerned. We do not construe Article 990 of the Code of Practice, as requiring imperatively in all cases, the preliminary offering for sale the property of estates for cash.

Another ground of illegality alleged by plaintiff is, that no *proces-verbal* of the sale of the land was returned to and recorded in the parish of Caddo. The *proces-verbal* of the sale was of record in the parish of Bossier, where the land lies, in the year 1852, as shown by a certificate of the deputy clerk of that parish, dated 28th April, 1852. This was some eight years before the plaintiff purchased, and at least it was notice to him. The omission, if it were omitted, to record the *proces-verbal* of sale in Caddo was not one of so grave a character as to operate a nullity of the sale. On the trial of this case, in the early part of 1862, it was taken down as an admission that plaintiff had been for three or four years previous, clerk of the parish of Caddo, and had charge of the papers of Schenick's estate.

The debts of the succession of Abner Schenick were community debts, and the property was community property, and bound for the payment of the community debts. The plaintiff's vendor was the widow in community, and her rights as well as those of the heir were only residuary. It is shown that Hart, the administrator, who was a principal creditor of the estate, was solicited by the widow to take upon himself the administration. He appears to have discharged the trust with fidelity.

The title of the estate, to the land in question was, in our view, legally divested by the probate sale made in January, 1845; consequently, in 1860, at the time the plaintiff received the deed from Ann Schenick, she had no right in the land to convey.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

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No. 252.—G. W. DENTON v. JAMES WOODS.

An action for a partition, where there exists a joint ownership of property may be maintained, whether the plaintiff is in possession or not.

Where a person permits the legal title to property to stand on the public records in the name of another, the property is liable for judgments and liens recorded against the apparent owner, and a sale made under such judgments, mortgages or liens, will confer an indefeasible title upon a purchaser, but a sale made under a *fi rei factus*, upon a judgment rendered subsequent to the *lex pendens* created by a *bona fide* suit between the legal and equitable owners, to adjust their rights to the identical property, confers no title greater than the debtor in execution had, notwithstanding the proceeds of the adjudication are used to extinguish the liens. As liens, they remained such, and payment or subrogation conferred no title to the land.

When property is seized by the sheriff, and advertised to be sold on a certain day, and the sale is stayed, it gives no right to a second seizing creditor to sell that property, disregarding the first seizure. A good title can only be conferred under the first seizure, which must be first released to enable a second seizure to become valid.

The seizing creditor can only acquire at a judicial sale the right title and interest of the debtor in execution—nothing more.

A suit to relieve property held in common from a public servitude enures to the benefit of the co-proprietor, and a judgment obtained cannot form the basis of title against one's co-owner, or authorize a party to prescribe.

**A** PPEAL from the Third District Court of New Orleans, *Buchanan, J. Hyams, Labatt & Jonas*, for appellee. *Elmore & King*, for appellant.

ISLEY, J. The plaintiff, claiming to be the owner and possessor of an undivided half of certain real estate described in his petition, instituted the present action against the defendant, who, he alleged, held the title to the other half, for a judicial partition.

The defendant, asserting title and sole ownership to the whole of the property described, excepted to the plaintiff's action, which he contended should have been one of *revendication*.

The exception, having been overruled in the Court below, the defendant answered, setting up title exclusively to the whole premises, to which allusion will be hereafter made, and he averred that the plaintiff was estopped from contesting his title.

Previous to the 24th July, 1847, the legal title to the whole of this property had stood recorded in the name of *James Erwin*, and on that day the plaintiff instituted against Erwin a petitory action, claiming to be the lawful owner of one undivided half of it.

After much litigation, all the questions raised in that case were finally disposed of, and judgment was rendered against Erwin, decreeing the plaintiff to be the owner of the undivided half of the property now in controversy; and this is the title which the plaintiff exhibits, and upon which his partition suit rests. See 6 An. 320.

The defendant produced, as his title, a deed of sale from the sheriff of the parish of Orleans, dated 17th June, 1850, under and by virtue of a writ of *feri facias*, in the suit of *Yeatman, Woods & Co. v. James Erwin*, No. 1201 on the docket of the Fourth District Court of New Orleans, and by which deed the defendant's authors acquired all the right, title and interest of James Erwin, the defendant in execution in the said suit, No. 1201.

The judgment in the suit No. 1201, was rendered on the 14th December, 1847, several months after the institution of the plaintiff's suit against James Erwin, so that the sheriff's sale to Yeatman, Woods & Co., under whom the defendant holds his title, could not effect in any manner that portion of the property which the plaintiff had claimed judicially from Erwin, and the purchasers at the said sheriff's sale acquired thereby only whatever right and title Erwin then had to the property; that is, to one undivided half of it. See C. C. 2428; 2 An. 254; 4 An. 293; 11 An. 258; 9 An. 257; 13 An. 260; Laws 13th, tit. 7 of the 3d Partidas; De Litigis in the Justinian Code, lib. 8, tit. 37.

If the sheriff's sale transferred more than one undivided half of the property described in his deed, "*nullum est venditio*" for the remainder, as "*nemo potest plus juris ad alium transferre quam ipse habet.*"

On and prior to the 24th July, 1847, the date of the filing of the plaintiff's petition against Erwin, several liens stood recorded against Erwin, which affected the land in controversy, as the plaintiff up to that time had permitted the legal title thereto to stand in Erwin's name in the public records, and had a judicial sale of this property been made under any of those liens, special or general, it would have conferred on any purchaser a title superior and paramount to that acquired by the plaintiff in his suit against Erwin.

The basis of the defendant's title was, however, as we have said, a

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sheriff's sale, made in virtue of a judgment rendered subsequent to the said 24th July, 1847, in the suit No. 1201.

It is true, that prior to the sheriff's sale, under the judgment in the suit No. 1201, an execution had been issued upon one of the anterior judgments, viz : that rendered in the suit of "*The Bank of Kentucky v. James Erwin*," No. 587, on the docket of the Fourth District Court of New Orleans, and which execution was made returnable on the 4th Monday of August, 1847, and that the property had been advertised under the writ in 587, to be sold on the 23d February, 1850, but no sale ever took place to satisfy that writ, and eventually it, as well as the other anterior liens, were satisfied out of the proceeds of the sale made in the suit No. 1201, to Yeatman, Woods & Co., the plaintiffs therein, who had become specially subrogated to those liens.

The defendant's title, his *jus in re* to the property, had for its basis, the judgment in the suit No. 1201, and no other.

The other claims recorded previous to the 24th July, 1847, never changed their character of *liens* upon the property; and, as such, they conferred no *title* on the purchasers at the sheriff's sale, in the suit No. 1201.

Upon the question of estoppel, the evidence is too vague to prove that the plaintiff was ever present at the sheriff's sale. It is, however, clearly shown that the sheriff, before proceeding to offer the property for sale, read aloud from the certificate of the register of conveyances, that portion of the decree in the suit of *Denton v. Erwin*, which awarded to the plaintiff the one undivided half of the same property he was about to sell.

This was a notice to purchasers, that to that undivided half Erwin had no title.

As to the suit between the defendant's authors and the city, to relieve the property of the public servitude, the plaintiff was no party to it, and the defendant's authors might well institute such a suit for their own benefit,

The joint ownership of the property is satisfactorily proved, and the plaintiff, whether in possession of it or not (C. C. 1243,) had the legal right to resort to an action for partition. C. C. 1215, 1231. 6 M. 284. 11 L. 426. 3 Rob. 44. 4 Rob. 453. 17 L. 248. 12 L. 154. 10 L. 458. 7 La. 442. 3 L. 136.

The judgment of the District Judge was in favor of the plaintiff, and for the reasons by him, and by us now assigned:

It is ordered, adjudged and decreed, that the judgment of the District Court be and the same is hereby affirmed, at the costs of the appellant. Rehearing refused.

## No. 845.—JOHN MCCRACKEN v. E. R. POOLE.

It is an attribute of sovereignty to authorize the issue of money, and to legalize its circulation as a medium of exchange.

By Article 1, § 10, of the Constitution of the United States, no State is permitted to coin money or emit bills of credit.

What one State is prohibited from doing, by the express language of the Constitution, cannot be legally performed by any combination of States.

The late so-called Confederate States never reached the dignity of a *de facto* Government, and, consequently, were without the legal right to coin money or emit bills of credit, or authorize their circulation as a medium of exchange.

The issuing of Confederate treasury notes was an act of rebellion, in palpable violation of law, and contracts growing out of the use of these notes, as a medium of exchange, cannot receive judicial sanction.

**A** PPEAL from the Third District Court of New Orleans, *Fellows, J.*  
Sheldon & Pardee, for plaintiff and appellant. *Semmes & Mott*, for defendant and appellee.

TALIAFERRO, J. The plaintiff sues the defendant for \$635 60, with interest, from 11th April, 1863. The action is founded upon a draft drawn as follows:

"\$635 60. ST. MARTINSVILLE, 11th April, 1863.

At sight, please pay to the order of Captain McCracken, six hundred and thirty-five dollars and sixty cents, for value received, and charge the same to account of your obedient servant.

E. R. POOLE.

To Messrs. Graves & Goldsmith, New Iberia, La."

The defendant, in his answer, admits the execution of the draft, and avers that it would have been paid in Confederate notes, according to the express understanding of the parties, had it ever been presented, which he denies; that the draft was drawn on funds of that character, and that payment in any other kind of notes or funds never entered into the contemplation of the parties at the time of the contract. Interrogatories were propounded to the defendant, and they were answered categorically, and with great fullness and precision.

The answers clearly establish all the averments of the answer. Judgment was rendered in the Court below in favor of the defendant, and the plaintiff has appealed.

The introduction of the answers, as evidence, was objected to on the ground that their effect would be to contradict a written agreement by parol proof. The objection was overruled. We find no bill of exceptions to the ruling of the Court, nor any motion to strike out the answers, or any part of them.

The Judge *quo* correctly remarks, in his judgment, that "the rule as to the exclusion of parol testimony to contradict written agreements, does not apply to such a case." *Kelly v. Ledoux*, 11 An. Rep. 690.

It is an attribute of sovereignty to authorize the issue of money, and to legalize its circulation as a medium of exchange. No State is permitted, by the Constitution of the United States, to coin money or emit bills of credit. Art. 1, § 10. This power being expressly given to Congress by the Constitution, and as expressly withheld from the States, it is clear that no State, nor any combination of States, can lawfully exercise that

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power. But it is contended that the power to coin money and emit bills of credit, belongs of right as well to governments *de facto* as to governments *de jure*; and, hence, to attach credit and legality to what is termed Confederate currency, so as to render it a fit exponent of value in matters of commerce, and to give it efficacy as an object of contracts between individuals, the prominent argument offered is, that it was created and put into circulation by the authority of a government *de facto*. In the case of *Smith v. Stewart*, recently decided, the opinion of this Court was given against the pretension of the late so-called Confederate States to the dignity of a *de facto* government. Those States have, since the termination of the rebellion, severally declared, in their conventions to form new constitutions, that their ordinances of secession were nullities; an admission clearly ignoring their assumed status as a *de facto* government.

The currency, in question, had its inception in the effort made by the States lately in rebellion to subvert the United States Government, by dissolving the Union of the States and establishing a confederation in the Southern section of the republic. That currency was made exclusive within the limits of the rebellion, and that by illegal and arbitrary force. Looking to the authority from whence it emanated, and the special purpose for which it was established, its legality as a circulating medium at any time heretofore, or now, cannot receive judicial recognition.

In the case now before the Court, the illegality and failure of consideration are fully shown.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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No. 872.—BERTOULIN v. BOURGOIN.

Citation must be addressed to the defendant in the suit, otherwise it is defective and void. Knowledge of the suit brought to the defendant in any other way, will not cure a defective citation.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*A. Derbes*, for plaintiff and appellee. *E. Bermudez*, for defendant and appellant.

**HYMAN, C. J.** A definitive judgment was rendered in this case against the defendant, *Mrs. Bourgoïn*, after a judgment by default had been taken against her.

She has appealed, and has assigned for error that she was not legally cited—the citation not having been properly addressed.

The citation was addressed, not to defendant, but to *Mrs. Bertoulin*.

The citation is defective in form. It should have been addressed in the name of the defendant. See Code of Practice, Art. 179.

Without a citation having been served on the defendant, or without her appearing or answering, no judgment could legally have been rendered against her. Code of Practice, Art. 206.

It is contended that the defendant could not have but known, in the



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service of this informal citation, that she was to appear and answer the suit, and that, therefore, the defect in the citation is insufficient to annul the proceedings of the lower Court.

Knowledge, on her part, that she would have to defend the suit, did not make a defective and insufficient citation a legal one, nor render valid proceedings in the suit against her. See Art. 206 C. P., already cited.

Let the judgments of the District Court be avoided, annulled and reversed, and let the case be remanded to the said Court, to be proceeded with according to law.

The plaintiff to pay the cost of appeal.

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No. 948.—In the Matter of the SUCCESSION OF THOMAS J. PIPKINS.—OPPOSITION TO CURATOR'S ACCOUNT.

This case involves only questions of fact.

**A** PPEAL from the Second District Court of New Orleans, *Thomas, J. B. Egan and J. S. Simonds*, for appellants. *Buchanan & Gilmore*, for appellee.

**TALIAFERRO, J.** The contestation in this case relates to the adjustment of the attorney's fees due by the estate. It appears that Mr. Egan was the attorney engaged by the curator to settle the affairs of the succession, and it seems that he superintended the settlement of the business generally, as the attorney of the estate. A fee of \$1,000 was charged by him for his entire services. The estate was of considerable amount, and it appears to have been involved in much litigation. The curator placed the attorney's fee upon his account, and it was opposed by Messrs. Buchanan & Gilmore as being excessive. The services of these gentlemen, in several cases against the estate, rendered by them for the curator, were also charged on the account. In one of these cases, a fee of \$250 was charged, which, by their own consent, was reduced to \$100. In the other, a fee of \$500 was charged. This, however, does not appear on the tableau.

The District Judge sustained the opposition of Messrs. Buchanan & Gilmore, to the extent of one-third of the amount set down for the legal services of Mr. Egan, and allowed the opponents \$333 $\frac{1}{3}$ , and Mr. Egan double that sum. From this judgment the latter has appealed.

The appellant contends that the opponents were never engaged as attorneys by the curator, and refers with much confidence to the testimony of the curator to establish that fact. The evidence of the curator on the subject, although seemingly confirmatory to some extent of the appellant's declaration, by no means makes good that position. We find on page 76 of the record, that the curator said: "I left the case to be managed by the Court and counsel. I have consulted Egan & Gilmore, both." "The party who went on my bond, went on it with the understanding that Gilmore should also settle the estate."

We do not find anything in the record that inclines us to make any other disposition of this unpleasant controversy, than that already made by the Court below.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts,

Rehearing refused.

No. 966.—S. N. PIKE & Co. v. C. DOYLE & Co.

A proposal to compromise is not admissible as evidence against the party making it, unless some fact or distinct liability is admitted in the offer.  
In actions for quasi offences the law has left a discretion to the Court and jury to assess the damages.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*Clarke & Bayne*, for plaintiffs and appellees. *Fellows & Mills*, for defendants and appellants.

*Brief of Clarke & Bayne, for plaintiffs.* \* \* \* Discretion is left to the jury to assess damages for quasi offences. C. C. 1928, § 3.

"In such actions the jury or Court must, in many cases, allow damages when no special damage is shown." *Martin Justice Carlin v. Stewart*, 2 La. 76. *Chataigne v. Bergeron*, 10 An. 669. *Varillat v. New Orleans and Carrollton Railroad Company*, 10 An. 87. *Black v. Same*, 10 An. 33.

The bill of exceptions taken to the questions propounded to Johnson, is not tenable. He was questioned as to the conversations between him and defendant Doyle, and his answer, as taken down is, "I told him I would prosecute him. Before I left, he came to the office of Longstreet, and offered to compromise it, and stop it. He and his partners came up and offered \$400, and lawyers' fees to stop the case." This is fully authorized, under the rule established in *Delogney v. Rentent*, 2 Martin 175, and *Agricultural Bank v. Jane*, 19 La. 1. \* \* \*

*Brief of Fellows & Mills, for defendant.* \* \* \* The principal testimony against the defendants was the substance of a conversation had between the defendant, Doyle, and the agent of the plaintiffs, who had threatened an expensive law suit, in which the defendant offered a compromise. This was objected to, on the ground "that proposals for a compromise or conversation about it, are not admissible. The Court overruled the objections, and admitted the testimony. We think the testimony should be excluded. See 19 La. 1, and cases there cited.

In any event, whatever offer was made it was to avoid a threatened law suit, and the evidence of the conversation did not disclose any facts touching the merits of the case.

HYMAN, C. J. The plaintiffs, S. N. Pike and S. N. Pike & Co., complained in their petition that they had been damaged, the former to the extent of \$15,000, the latter to the extent of \$5,000, by defendants, who had counterfeited their brand in selling whisky.

They prayed judgment against defendant for the alleged damages.

Pike &amp; Co. v. Doyle &amp; Co.

The Judge rendered judgment, in pursuance to the verdict of a jury against defendants, condemning them to pay S. N. Pike \$750, interest and cost, and S. N. Pike & Co. \$250, interest and cost.

Defendants are appellants from this judgment.

On the trial, plaintiff offered to prove by Wm. W. Johnson, that defendants proposed to compromise the suit by paying \$400, and the lawyers' fees.

To the introduction of this evidence defendants objected, on the ground that a proposal for a compromise is not admissible as evidence against the party making such proposal.

The Court overruled defendants' objection, and admitted the evidence. The defendants reserved the point, in a bill of exceptions.

An offer made to buy peace is not to be taken advantage for the purpose of evidence, unless some fact or distinct liability be admitted in the offer; since the offer may have resulted not from the consciousness of indebtedness, but from a desire to avoid litigation. See 19 La. page 11.

The Court erred, in admitting the evidence, as no fact nor distinct liability was admitted by defendants, in their proposal for a compromise.

The evidence that was properly admitted, satisfies us that the brand, which defendants counterfeited, for the dishonest purpose of reaping a profit, by dissembling to the injury of others, was used by S. N. Pike & Co., in selling their whisky—not by S. N. Pike.

That part of the judgment, in favor of S. N. Pike, is, therefore, erroneous.

The exact extent of damage done by defendants, by their nefarious acts to S. N. Pike & Co., is not shown by the evidence; but, in cases like this, the law-maker has merely left a discretion in the Judge or jury to assess damages, without proof of their exact amount. Civil Code 1928, § 3.

The assessment of damages, by the jury in favor of S. N. Pike & Co., we see no reason to disturb.

Let that part of the judgment of the District Court that condemns defendants to pay S. N. Pike \$750, with five per cent. interest, from the date of the judgment, and cost of suit be reversed, and let that part of the judgment which condemns the defendants to pay S. N. Pike & Co. \$250, with five per cent. interest, from the date of the judgment, and cost of suit, be affirmed.

#### No. 871.—B. LAPLACE v. J. J. HAYDEL

Where minor heirs have a general mortgage upon the property of their tutor, they cannot have recourse upon his property specially mortgaged, if the tutor has other property subject to the general mortgage sufficient to discharge it.

An unliquidated mortgage of a minor does not prevent a sale of the property of the tutor specially mortgaged by the owner's judgment creditor.

If the legal mortgage of the minor heirs, has superiority of rank and priority of date to the special mortgage, the property seized will pass to the purchaser subject to the legal mortgage, and their right to pursue it by the hypothecary action will remain unimpaired.

**A** PPEAL from the Third District Court of New Orleans, *Foute, J.*  
Grandmont and Bonford, for appellee. E. Bermudez and J. Meunier  
for appellants.

Laplace v. Haydel.

**TALIAFERRO, J.** In February, 1861, the plaintiff, by executory process, caused six slaves belonging to defendant to be seized, and sold for the payment of a debt of \$2,000, with interest, due him by defendant. The opponents aver, that in right of their deceased mother, former wife of defendant, they have a legal mortgage on his property, arising from his having appropriated to his own use and benefit a large sum of money, the proceeds of sale of a plantation, which was the separate property of their mother. The defendant is the father of the opponents, and was formerly their tutor. They set out in their opposition the specific amount and character of their several claims, pray judgment against the defendant for the same, and that the proceeds of the sale of the mortgaged slaves be applied to the payment of these claims.

The plaintiff answered, denying all the allegations of the opponents' petition, and afterwards filed a peremptory exception to the right of the opponent to proceed in this case, on the ground that the claim they set up is unliquidated. The exception was sustained, and the opposition dismissed. The opponents thereupon appealed.

Having a general mortgage, the opponents could not have recourse upon property of their tutor specially mortgaged, if the tutor had other property subject to the general mortgage sufficient to discharge it. C. P., Art. 403.

An unliquidated mortgage of a minor does not prevent a sale of the property by the owner's judgment creditor. 13 An. 508. 12 An. 361. same page 71, C. P. 715. 6 Rob. 51.

If their legal mortgage, as these opponents allege, have superiority of rank, and priority of date to the plaintiff's special mortgage, the property seized would pass to the purchaser, subject to the legal mortgage on the condition expressed, and their right to pursue it by the hypothecary action would remain unimpaired. That right was reserved to the opponents by the judgment of the lower Court. But, events that have arisen since the rendition of the judgment, have annulled and destroyed their former right of mortgage, so far as it rested upon the then slaves of their tutor, and they are now left to such other recourse against him as may still exist.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, so far as it sustains the exception, and dismisses the opposition; and that it be annulled, avoided and reversed, in all other respects, reserving to the opponents all legal rights they may have to enforce their legal claims, if any against the defendant, their former tutor. The opponents and appellants paying costs in both courts.

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 No. 989—JOSEPH LALLANDE v. GEORGE INGRAM—THE SAME v. R. M. DAVIS.

In all cases of pledge, the pledgee must be put in possession of the thing pledged, and, if it be a claim, the evidence of the obligation must be transferred and delivered.

Shares of stock cannot be pledged, unless they be evidenced by certificates, which must be transferred and delivered to the pledgee.

A transfer or sale of stocks cannot be inferred, when the relation of debtor and creditor exist on the face of the act of pledge.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*Geo. L. Bright*, for plaintiff and appellant. *T. A. Barlette*, for defendants and appellees.

Lallande v. Ingram.—The Same v Davis.

*Brief of G. L. Bright, for plaintiff and appellant.* \* \* The act of pledge which plaintiff sets up as having been passed before Hugh Madden, Notary Public, on 9th April, 1863, is fatally defective, and is entirely null and void; that no stock had ever been issued to R. M. Davis at the time of the pretended pledge; that the formalities and requisites of law were not observed in the alleged act of pledge.

During the pendency of this injunction suit, Lallande, who had obtained a judgment against Davis, seized and sold the 1,000 shares, and the proceeds being in the hands of the sheriff, he took a rule on Ingram and the sheriff, to show cause why the sheriff should not pay him the full amount of his judgment, with interest and costs.

By consent of all parties, this rule which involves the questions presented in the injunction suit, is consolidated with it.

We return to the injunction suit.

By authentic act, J. E. Livaudais, agent of R. M. Davis, transferred and pledged to Lallande the 1,000 shares of stock.

The authority of Livaudais is sufficient.

The transfer and pledge was made on the 9th April, 1863, and it is admitted that on the same day the President of the Mechanics' and Agricultural Fair Association was notified of the transfer and pledge, and a copy of the act was served upon him. The Association had never issued any certificate for these shares.

The *feri facias*, issued by Ingram, purported to have been issued by the Fourth District Court of New Orleans, except that it was signed by T. W. Hall, who was clerk of the Fifth District Court. An unaltered blank of the Fourth District Court was used in making out the *feri facias*.

Shall the proceeds of the sale go to Lallande or Ingram?

The transfer and pledge to Lallande is valid. C. C. 3100. The pledge is a contract by which a debtor gives something to his creditor as a security for his debt.

The share of an association is something, for it is the subject of a right.

But the counsel for Ingram refers us to Act 1855, No. 287, and to Arts. C. C. 3123, 3129; and to 17 La. 430; 1 An. 341.

The Act of 1855, Section 1, provides that when a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations or claims on other persons, he shall deliver to the creditors, the notes, bills of exchange, certificates of stock or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith. Sec. 2. All pledges of movable property may be made by private writing accompanied by actual delivery, C. C. 3123. When a debtor wishes to pawn a claim on another person, he must make a transfer of it in the act of pledge, and deliver to the creditor to whom it is transferred, the note or obligation which proves its existence, if it be under private signature, and must endorse it, if it be negotiable.

C. C. 3129. In no case does this privilege subsist on the pledge, except when the thing pledged, if it be a corporeal movable, or the evidence of the debt, if it be a note or other obligation under private signature, has



been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties. \* \* \*

The act of 1855, and the above-mentioned articles of the Civil Code, contemplate the existence of a negotiable instrument or a claim in writing. They speak of the delivery of promissory notes, bills of exchange, stocks, obligations or claims upon other persons, or other evidences of the claims or rights pawned.

It is the delivery the law requires, and when a thing can be actually delivered, the delivery must be made; the law we have considered contemplates the pledging of the things of which it speaks how the delivery shall be made. But it does not mean that what cannot be actually delivered cannot be pledged. Art. 3120 says, this delivery is only necessary with respect to corporeal things; as to incorporeal rights, such as debts, which are given in pledge, the delivery is merely fictitious and symbolical. Art. 2453 says, the tradition or delivery of movable effects takes place by their real tradition, or by the delivery of the keys of the buildings in which they are kept; or even by the bare consent of the parties, if the things cannot be transported at the time of sale, etc. C. C. 2457. The tradition of the incorporeal rights is to be made either by the delivery of the titles and of the act of transfer, or by the use made by the purchaser with the consent of the seller. C. C. 3127. When the thing given in pledge consists of a credit not negotiable, to enable the creditors to enjoy the privilege above mentioned it is necessary, not only that the proof of the pledge be made by an authentic act, or by act under private signature, duly recorded as stated in the preceding article, but that a copy of this act shall have been duly served on the debtor of the credit given in pledge.

*Brief of T. A. Bartlette, for defendants and appellees.* \* \* The evidence shows that the stock was seized and advertised for sale under Ingram's judgment, when the sale was enjoined, and that it so remained under seizure until sold. None of the documents or records in the sheriff's office, show any indications of the irregularities urged by plaintiff; and a bill of exceptions was taken to the introduction of parol testimony, to contradict those records. The writ bore the seal, and was signed by the clerk of the Fifth District Court, and all the proceedings of the sheriff were in the name of that Court. But if the error existed, it did not affect the interests of the plaintiff, and afforded him no ground for injunction. *Skillman v. Purnell et als.*, 3 L. 494. *Oakey v. Aiken*, 12 An. 11. *Harper v. Com. and R. R. Bank of Vicksburg*, 15 An. 136. It would not have justified even the defendant in enjoining. *Hudson v. Dangerfield et als*, 2 L. 66; *Morgan v. Whitesides' Curator*, 14 L. 280.

Lallande had no right to enjoin the sale, even if he had a valid pledge on the property seized. He had merely a right of preference, and his remedy is pointed out in the Code of Practice, Art. 401; *Williams et al v. Schooner St. Stephens*, 1 N. S. 417; *Herbert's Heirs v. Babin et al*, 6 N. S. 614; *B. Antognini v. Railey*, 11 An. 275; *Vanhille v. Her Husband*, 5 R. 496; *Gil v. Her Husband*, 10 R. 28.

But Lallande had no pledge. Nothing was delivered to him. The certificates of stock had not been issued: there was no tangible evidence

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of its existence, and, therefore, nothing susceptible of being pledged.

The "evidences of the claims" were not, in the language of the law, delivered to the creditor. Revised Statutes 405. Civil Code, Arts. 3123, 3129. *Winchester v. Ory, s Syndic*, 17 L. 430. *Succession of Hillisberg*, 1 An. 341. *Pothier's Cont. de Nantissement*, vol. 2, p. 1179.

Besides, the judgment Lallande is now attempting to execute, is not the one attempted to be secured by the contract of pledge, which referred to a judgment then rendered and ready to be executed; whereas, the judgment now sought to be enforced was rendered in a suit brought long after the execution of the contract of pledge, and could not have been the subject of it.

Ingram became invested with a privilege on the stock by virtue of his seizure, and is entitled to the proceeds, unless a better right be shown affirmatively. C. P. 722. *Loze v. Dimitry et als*, 7 L. 485. *Payne v. Randon*, 10 An. 349, id. 728, 429. *Campbell v. His Creditors*, 3 R. 106. *Stafford v. Dunwoodie*, 3 R. 276. *Lafleur et als v. Girard*, 11 R. 493.

The judgment, therefore, in the case of *Lallande v. Davis*, ordering the proceeds of the stock to be paid to Ingram is correct, and should be affirmed. But the judgment, in the case of *Lallande v. Ingram et als*, should be amended so as to allow twenty per cent. damages on the amount of Ingram's judgment enjoined. Acts of 1833. *Betts v. Mongin*, 15 An. 52. *Corning v. Elliott*, 10 An. 753.

LABAUVE, J. On the 9th April, 1863, R. M. Davis, being indebted unto Joseph Lallande, in the sum of \$3,750 97, with interest, and cost of protest, executed through his agent, Livaudais, an act of transfer and pledge unto the said Joseph Lallande, of the following described shares of stock, to wit:

"All and irregular, one thousand shares of twenty-five dollars each, in the capital stock of the Mechanics' and Agricultural Fair Association of Louisiana, a duly incorporated association of this State, which have been subscribed and paid for by said R. M. Davis."

It is stated in the act by the agent, that to his knowledge no certificate of said one thousand shares of stock has been issued to said Davis.

George Ingram, having obtained a judgment in the Fifth District Court of New Orleans for \$15,680, against said R. M. Davis, caused a *feri facias* to be issued, which was put in the hands of the sheriff on the 21st September, 1863, and it seems that he executed this writ, and on the 20th October, 1863, returned it by order of plaintiff, and another *feri facias* issued on the same day. The stock had been seized under the first *feri facias*, and remained under that seizure until sold under the writ, in the case of *Lallande v. Davis*.

On the 17th October, 1863, Joseph Lallande enjoined the writ which the sheriff had executed, by seizing and advertising for sale the said one thousand shares of stock. The plaintiff, in his petition for an injunction, states that the sheriff, in the case of *Ingram v. Davis*, has seized and advertised for sale the said one thousand shares of stock in the Mechanics' Agricultural Fair Association. That said shares are pledged to him to secure the sum of \$3,750 97, and that the same cannot be seized and sold before the amount due him is satisfied, and that the said seizure is

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illegal; that the said seizure and advertisement are illegal, because the suit of *George Ingram v. R. M. Davis* was instituted before, and the judgment thereon was rendered by the Fifth District Court of New Orleans, and the writ of *alias fieri facias*, by which the seizure was made, and the proceedings conducted by the sheriff, was issued by the Fourth District Court of New Orleans.

The defendant, in the injunction, George Ingram, in his answer, claimed the dissolution of the injunction, with interest and damages. In the meantime Lallande obtained a judgment on his note against Davis, and under an execution issued thereon, seized and sold the said one thousand shares of stock, and took a rule upon the sheriff and Ingram, to show cause why the proceeds of said stock should not be appropriated to the satisfaction of his judgment. Ingram, in his answer, claimed the said proceeds by virtue of his prior seizure, and denying Lallande's pledge. The rule and injunction were tried together.

The District Court dissolved the injunction, with interest, and allowed the said proceeds to George Ingram.

Joseph Lallande took this appeal.

This case involves none but questions of law.

The first presented is, whether or not Joseph Lallande has a privilege as pledgee, upon the proceeds of sale of said stock.

In all cases of pledges, the pledgee must be put in possession of the thing pledged, and if it be a claim, the evidence of the obligation must be transferred and delivered. C. C. Arts. 3100, 3119, 3120, 3122, 3123, 3129. Acts of 1855, No. 287, *Winchester v. Ory's Syndic*, 17 L. 428. Shares in stock cannot be pledged, unless they be evidenced by certificates, which must be transferred and delivered to the pledgee. In this case, there were no such certificates of stock, therefore nothing was or could be delivered to Lallande. But the appellant contends that the said stock was transferred to him and the President of the Association, was duly notified thereof, and that this transfer was good against third persons.

This position is not tenable; it was not a sale or a transfer made in that form, nor a *dation en payment*; the thing remained the property of the pledgor, and at his risks; the debt was not paid, nor novated; the relations of creditor and debtor still existed on the face of the act of pledge.

We are of opinion that Lallande acquired no right to said stock, either as pledgee or as transferee. The appellant further contends, that the seizure by Ingram was null, because the execution issued from the Fourth District Court, when the judgment had been rendered in the Fifth District Court of New Orleans. On that point, it appears that the execution was headed Fourth District Court, (it being a printed form of that Court) but the writ bore the seal of the Fifth District Court, and was signed by the clerk of that Court, and all the proceedings of the sheriff thereon were carried in the name of that Court. We look upon this as a clerical error, which was corrected on the face of the writ by his seal, and the signature of the clerk of that Court; but be that as it may, such informality did not regard or interest the appellant, it was a matter for the seized debtor to urge. 12 A. 11. 15 A. 136.

The appellant further contends, that having seized the said stock, he acquired a privilege on the proceeds thereof.

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Subsequent to the granting of the injunction obtained by Lallande, arresting the sale of the stock seized by Ingram, he (Lallande) obtained a judgment, and on the 8th March, 1866, caused to be seized the same stock, which was sold accordingly. We are satisfied, that when Lallande seized the said stock, the same was still under seizure for Ingram who had been enjoined by Lallande from selling; besides, the appellant having, without right, prevented Ingram from proceeding on his judgment, cannot take advantage of his own wrong; for Ingram was fairly on the way to make his money, when enjoined by Lallande, who obtained a judgment, but long thereafter.

But we are of the opinion that the judgment appealed from is erroneous in allowing five per cent. interest, when the judgment enjoined bears eight per cent., and we do not think it a case where damages should be granted.

It is therefore ordered and decreed, that the judgment rendered below be so amended as to strike out the five per cent. interest, and that as amended it be affirmed, the appellee to pay the costs of appeal.

#### No. 1373.—SUCCESSION OF JOHN CRUSIUS.

Subjects of Bavaria are exempt by the consular convention, entered into between the United States and that kingdom on the 21st of January, 1845, from the tax of ten per cent. on successions in this State, going in whole or in part to persons not being domiciliated in this State, and not being citizens of any other State or territory of this Union.

**A**PPEAL from the Second District Court of New Orleans, *Thomas, J. J. Laverne*, for curator, appellee. *E. Bermudez*, for State, appellant.

**LABAUVE, J.** The testamentary executors of John Crusius, having rendered a final account or tableau of administration of the succession of said John Crusius, prayed for its homologation.

This State, through her auditor, has opposed said tableau on the ground that said John Crusius has departed this life, and his universal and only heirs, parties not domiciliated in this State, and not citizens of any State or territory in the Union, are bound to pay to the State a tax of ten per cent. on all sums, or on the value of all property accruing to them in said succession. That it appears from said account and tableau, that the succession amounts to \$133,448, upon which the State has a right to levy said ten per cent. tax.

The District Judge, after hearing the evidence, dismissed the opposition and homologated the tableau.

The State appealed.

On trial of the case below, it was admitted that the heirs of the deceased are subjects of Bavaria. We are of opinion that, under articles second and third of the consular convention, entered into between the United States and Bavaria, on the 21st January, 1845, the said heirs, although subjects of Bavaria, are not liable to pay the tax of ten per cent. herein

claimed by this State. See the treaty, United States Statutes at Large, vol. 9, p. 826. This Court has given the same effect to a similar treaty with the French Emperor. *Succession of Dufour*, 10 An. 391; and *Succession of Arnoult*, 18 An. 403.

We are of opinion that our learned brother decided correctly.

It is therefore ordered and decreed, that the judgment of the District Court be affirmed, with costs,

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No. 943.—BENJAMIN MEYERS v. ISAAC SIMMONS.

Where an agent, holding a power of attorney to sign promissory notes, executes a note as agent for a bill of goods, and the principal promises to pay the note, thereby ratifying the act of his agent, he cannot afterwards avoid payment on the ground that the act of the agent was not within the scope of the agency.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.* *Philips & Levy*, for plaintiff and appellee. *A. & M. Voorhies*, for defendant and appellant.

**TALIAFERRO, J.** This action is upon a promissory note for \$924, drawn by D. Beer, as agent of the defendant, to the order of Myers & Levy, payable sixty days after date, 13th January, 1866.

The answer is a general denial.

The defendant specially denies that Beer was authorized by him to draw the note sued upon, and that he was his agent. The case was twice tried in the Court below, and each time with the same result, the rendition of judgment against the defendant, who appeals.

The signature of Beer, as agent, and his authorization to draw promissory notes, in the name of Simmons, are fully proved. The endorsement of the payees, under which the plaintiff holds, is not so fully established.

Pierson, a witness, testified on the first trial that the endorsement is in the handwriting of the payees; on the second trial, he stated that the endorsement is in the handwriting of S. J. Weilman. No authority is shown to Weilman to make the endorsement. The defendant resists the payment of the note on the further ground that it was executed for a consideration personal to the agent, and for a matter not within the range of the business of the principal. The evidence shows that the note was given to Myers & Levy, for goods purchased by Beer to take to Matamoras. It appears that Simmons purchased goods in New York, and shipped them to Matamoras. Before his departure for New York, he went with Beer to Bloom, a witness, and told Bloom that Beer wanted to buy goods for Matamoras, and asked him to let Beer have them, telling Bloom that he would pay him for whatever goods Beer might buy of him, if Beer failed to do so himself. Beer went to Matamoras in January, 1865, for the purpose of engaging in business there. Previously, he was doing a small dry goods business in New Orleans, as agent of Simmons. It appears that Simmons, after his return to New Orleans, was applied to by Myers for payment of the note, and that he replied to him that if he would give



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him time he would pay it, but if he sued him he would not pay it. The business relations shown to have existed between these persons seems to cast some doubt upon the truth of the defendant's averment, that the giving of the note by Beer to Myers & Levy was an act not within the scope of the agency. Be this as it may, his agreement to pay the note amounts to a ratification of his agent's act, and defeats this ground of his defence. We think the plaintiff has made out his case, and that he is entitled to recover.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

Rehearing refused.

No. 1299.—HARVEY TATE, Administrator, v. H. A. K. FLETCHER et als.

The doctrine in *Wainwright, Administrator, v. Bridges*, (ante page 294) reaffirmed.

Where the consideration of the sale was a slave, who afterwards became free by the act of the sovereign power, the Courts are without authority to enforce payment of the price. They are alike without authority to give judgment for the hire of the person (slave) before emancipation.

**A** PPEAL from the District Court, Parish of East Feliciana, *Ellis, J.*  
*Wilson & Williams*, for plaintiff. *A. Addison*, for defendants.

*Brief for plaintiff and appellant.* \* \* \* I apprehend, may it please the Court, that the sole question presented by the pleading and the evidence adduced in this cause is, shall the plaintiff be permitted to recover the purchase price of the "slave Dick," as evidenced by the notes sued on and made by the defendants, October, 1860?

This suit, upon these notes, was filed with the clerk of the Sixth District Court, St. Helena, on the 24th of December, A. D., 1862, but was not tried until May, 1866. It will not be denied or doubted, that at the time of the purchase of the "slave Dick," October, 1860, and the execution of the notes (the price or consideration) and of their respective maturities and the filing of this action, the law, as it then was, that the defendants would be compelled by the Courts to pay and satisfy these notes. It was the duty of the defendants to pay them. Infidelity to their obligations is the cause of the present suit. If the defendant has lost the slave through the action of the State and General Governments, emancipating slaves, the loss must be borne by herself. Her title was not contingent, suspensive or conditional, but was absolute at the moment of the adjudication. It is unnecessary to say more.

*Brief for defendants and appellees.* \* \* \* We, therefore, proceed to consider the second ground of defence, and submit the following propositions, to be sustained by argument and authorities to be cited upon the trial, viz:

1st. That by the act of the sovereign authority, which is equally binding upon the plaintiff and defendant, and for which the said plaintiff is equally responsible with the defendant, the consideration for which the note sued on was given has been destroyed, and that the plaintiff is estopped and restrained from obtaining, and the Court from granting a

judicial remedy to enforce the performance of a contract based upon African slavery.

2d. That said contract, having been entered into on the part of both plaintiff and defendant, with reference to and under guarantees and protection contained in the laws and Constitutions of the Federal and State Governments upon the subject of African slavery, and those guarantees and protection which entered into, the consideration for which the note sued on was given, having been revoked, annulled and abolished by the sovereign authority of the Federal and State Governments, the plaintiff is estopped and restrained from obtaining, and the Court from granting a judicial remedy to enforce the performance of the said contract.

3d. That by the acts of the sovereign authority, as aforesaid, the judicial authority can no longer be envoked to enforce the rights acquired by this defendant under the contract sued upon, and that the said plaintiff is estopped and restrained by equity and good conscience from obtaining, and the Court from granting a judicial remedy to enforce the performance of the said contract in favor of the other contracting party only.

4th. That by the acts of the sovereign authority, as aforesaid, African slavery has ceased to be the subject of conventional obligations, and of judicial action, and it is contrary to equity, to good conscience, to good morals and public policy, to enforce the performance of obligations which have no longer the sanction of the laws of the land, and under which the reciprocal rights and responsibilities of parties, created by said contracts, can no longer be enforced by judicial authority.

TALIAFERRO, J. This suit is brought to recover the amount of two promissory notes of a series of three, executed for the payment of the price of a slave purchased by the defendant at a probate sale. The defence is failure of consideration from the emancipation of slaves by the sovereign power.

The judgment rendered by the Court below, released the defendants from the obligation of paying the notes sued upon, but allowed the plaintiff six hundred dollars for hire of the slave during the time he had him in possession.

The plaintiff appealed.

For the reasons assigned in the late case of *Wainwright, Administrator, v. Bridges*, it is ordered that the judgment of the District Court, releasing the defendants from all obligation to pay the notes sued upon be affirmed, and that that part of the judgment allowing hire for the slave be annulled, avoided and reversed, the plaintiff and appellee paying costs in both courts.

Justices LABAUVE and ILSLEY dissenting.

For the reasons given in our dissenting opinion, in the case of *Wainwright v. Bridges*, No. 1305, we dissent in this case.

ZENON LABAUVE,

Associate Justice.

JOHN H. ILSLEY,

Associate Justice.

## No. 1001.—A. G. NALLE v. J. A. VENTRESS.

Where the defence is, that by the law of the State where the contract is made, the surety is not liable, provided he has given notice to the holder, until he has prosecuted the principal to insolvency, the statute must be filed in evidence; otherwise the Court will presume that the law is similar to our own, and the case will be determined according to the laws of Louisiana.

The law of the place where the contract is made fixing the rate of interest will govern, provided the statute is filed in evidence.

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*Jas. Brewer*, for plaintiff and appellee. *Hays, Adams & Moise*, for defendant and appellant.

HOWELL, J. This is an action upon a promissory note, made at Woodville, Miss., by W. L. Cage and the defendant, jointly and severally, and payable to the order of Edward Nalle & Co., at their counting-room in this city, and by them specially endorsed to plaintiff.

The defence is, that Ventress, the defendant, was only surety for Cage, to the knowledge of the payees, who were requested by defendant, before and after maturity, but without success, to take legal proceedings for the collection of the note against said Cage, who had ample means, and that plaintiff became the owner and holder of the note after maturity, and with knowledge of the above facts.

Counsel for defendant and appellant, in their brief, "insist that witness is only liable conditionally, i. e., that being merely a surety, by the law of Mississippi, he is only bound on the note after the principal, Cage, is prosecuted to insolvency, provided witness had notified the holder of the note to pursue Cage, as required by the statute."

As this statute of Mississippi is not in evidence, we are to presume that it is similar to our own law, under which the facts, if all proven, would not release the defendant. No equities, as to the consideration of the note between the actual debtor and the payees, are pleaded.

The plaintiff, in his answer to the appeal, has prayed that the judgment be amended so as to allow ten per cent. interest, as stipulated in the note, and authorized by the law of Mississippi, where the contract was made; and has filed in evidence the statute of that State, which sustains his demand. See 8 N. S., p. 1; 3 A. 88.

It is therefore ordered, that the judgment appealed from be so amended as to allow ten instead of eight per cent. interest, and as thus amended it be affirmed, with costs.

## No. 1005.—RIGGIN &amp; Co. v. MERCHANTS' BANK.

A final judgment, rendered without a judgment by default being first taken, is a nullity, and will be so declared on appeal.

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*E. W. Huntington and Roselius & Philips*, for plaintiffs and appellees.  
*Clarke & Bayne*, for defendant and appellant.

Riggin &amp; Co. v. Merchants' Bank.

**LABAUVE, J.** This is a suit brought to obtain a judgment of forfeiture of the charter of said bank, as authorized by the 20th section of the act entitled an act to establish a general system of free banking in the State of Louisiana, approved 15th March, 1855, the said section being amended and reenacted by an act approved on the 18th March, 1858.

The Attorney-General, having been duly notified of the proceedings as prescribed by law, on the 15th May, 1865, filed a petition, stating that he has ascertained that there is neither a legal nor equitable defence to the payment of the notes so alleged to have been presented to said bank, and the payment of which was refused, and praying among other things that said bank be cited, and that a forfeiture be decreed, etc.

The bank did not answer, and no judgment by default was rendered, and the Court rendered a final judgment of forfeiture of the charter of the bank, on the 12th June, 1865.

The defendant appealed.

We are of opinion the Judge erred, in rendering a final judgment, without first having rendered a judgment by default.

This case is substantially similar in the pleadings and form of proceedings to that of *B. W. Huntington v. The Crescent City Bank*, in the Third District Court of New Orleans, and reported in 18th An. 350. The view we have taken of the law in that case, in regard to the proceedings in forfeiture of the charter of a bank, must govern this case.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be annulled and avoided; it is further ordered and decreed, that this case be remanded to be proceeded in according to law. The appellee to pay the costs of appeal.

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No. 934.—*TAYLOR & KNAPP v. T. L. MCGEE*.—*ROSEMOND LORIO*,  
Garnishee.

The garnishee is not required to answer, categorically, every question asked in the interrogatories; it is sufficient if his answers negative every fact enquired of in the interrogatories.

**A**PPPEAL from the Sixth District Court of New Orleans, *Duplantier, J. Ed. Rawle*, for appellee. *G. Schmidt*, for appellant.

**HYMAN, C. J.** In the above-named case, the plaintiffs obtained a judgment against the defendant, McGee, caused execution to issue thereon, and propounded interrogatories to Rosemond Lorio, under authority of the statute 20th March, 1839, page 166.

The time having elapsed, in which Lorio was ordered to answer the interrogatories, a rule, on motion of plaintiff, was served on him to show cause why judgment should not be rendered against him.

Lorio had filed with the clerk an answer under oath to the interrogatories. On the trial of the rule his answer could not be found, and he asked permission to again answer the interrogatories.

Permission was refused by the Judge, and he excepted to the refusal.

The Court received parol evidence of the answers of Lorio to the interrogatories, made the rule absolute, and rendered judgment against him,

condemning him to pay the amount of plaintiffs' judgment against the defendant, McGee.

Plaintiffs had a right to the answer of Lorio, to use as evidence against him, and the Judge did not err in refusing to take other answers than that already given.

The question now comes up, is the answer responsive to the interrogatories?

They are as follows:

"1st. Had you in your hands or under your control, directly or indirectly, at the time of the service of notice of seizure in this case, or since, or at the time of service of these interrogatories, or at any time since, or at the time of answering these interrogatories, any money, rights, credits, or other property whatsoever, directly or indirectly belonging or due to the said defendant in execution, or in which he has or had any direct or indirect interest for the whole or for a part, or otherwise; and if yea, what is the nature, description or amount thereof; and is the same not sufficient to pay or satisfy the full amount of said judgment and costs; or if less to what amount? You, being asked, and required to make a full disclosure in relation to the same.

"2d. Were you not, at the time of service of seizure upon you in this case, or since then, or at the time of service of these interrogatories, or since, or at the time of answering the same, directly or indirectly, indebted or obligated unto the said defendant in execution for anything, or for any sum whatever, whether for yourself alone, or together with others, in consequence of any sale, or exchange, or transfer, or assignment, or payment, or novation, or compensation, or letting, or hiring, or service, or labor, or employment, or affreightment, or insurance, or job, or work, or rent, or interest, or partnership, or lease, or deposit, or trust, or bailment, or agency, or suretyship, or compromise, or pledge, or in consequence of any control or obligation whatsoever, whether the same be due or to become due, and whether the interest of the defendant in execution be direct or indirect, or be for the whole, or a part only, or whether it be by bill, note or otherwise; and if yea, what is the nature, description, and amount thereof, and is the same not sufficient to pay, or satisfy the full amount of said judgment and costs; or if less, what amount? You being asked, and required to make a full and detailed disclosure in relation to the same.

"3d. Have you, at any time since the service of notice of seizure in your hands herein, made, directly or indirectly unto or with the said defendant in execution, any payment or novation, or compromise or arrangement, or given him any note or other written obligation, or received from him directly or indirectly, any receipt or acquittance, or received, acquired against him, directly or indirectly, any compensation or set-off, or demand, or note, or other obligation, or right of action? And if yea, state the nature, description and amount thereof, and the time, place and circumstance of the same."

The witness testified, as to the answer, thus: "The answer, in substance, was, that the garnishee had no property belonging to defendant, and that he owed him nothing. The answer was sworn to. I recollect



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Taylor & Knapp v. McGee.—Lorio, Garnishee.

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distinctly, that the answer specified no debt. The garnishee did not answer each interrogatory separately. It was a general answer."

The interrogatories are enquiring of Lorio, whether he had property of or was indebted to the defendant, McGee, at the time of the service of notice of seizure, or of the interrogatories, or since; and his answer must be taken as having reference to the time designated in the interrogatories.

It was a negation of every fact enquired of in the interrogatories.

Let the judgment of the District Court be annulled, avoided and reversed, and let the suit be dismissed, as against Lorio, at plaintiff's costs.

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No. 942.—CITIZENS' BANK OF LOUISIANA v. BELLOCQ, NOBLOM & Co.

A motion for a new trial is in time, if made before the judgment has been presented to the Judge for his signature, although more than three days may have elapsed after judgment was rendered. If a party withdraws his application for a new trial, and does not embody his withdrawal in a bill of exceptions, he thereby waives his right to a hearing thereon in the Supreme Court.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*A. Pilot*, for plaintiff and appellee. *A. & M. Voorhies*, for defendant and appellant.

**HOWELL, J.** This is a suit upon fifteen notes and drafts, amounting to \$56,218 48, the defence to which is a general denial. Judgment was rendered against defendants on 5th February, 1866, and signed on the 9th February, 1866. On the latter date, before the judgment was signed, the defendants, through counsel, made a motion for a new trial, which, on objection by plaintiff's counsel, the Court refused to entertain, on the ground that it came too late, the three judicial days allowed by law for making the same having expired; to which ruling a bill of exceptions was taken.

As said in the case of *Smelsor v. Williams*, 4 R. 152, we differ in opinion with the Judge *a quo*, and think he ought to have considered the motion; particularly, as it appears to have been filed, and it is not shown that the judgment was presented to the Judge for signature before the application for a new trial was made *in open Court*. We think the jurisprudence settled, that until the judgment is signed, application may be made for a new trial. See C. P. 546, 548, 559; 5 N. S. 320; 4 R. 152. The right to do what is ordered, or permitted to be done within a given time, exists so long as no action of the Court, or the opposite party, has intervened to conclude that right, unless special provisions of law produce a different consequence.

The defendants, however, having withdrawn their application for a new trial, and not embodied it in the bill of exceptions, have, in our opinion, waived the right to a hearing thereon. The grounds on which the application was based, are not before the Court for examination, and

*Citizens' Bank of Louisiana v. Bellocq, Noblom & Co.*

to remand the case for a new and different application, or to renew the one which was voluntarily withdrawn, would be irregular.

Upon examining the record, we discover no cause for disturbing the judgment on the merits.

Judgment affirmed.

Mr. JUSTICE LABAUVE, being a stockholder, recuses himself.

Rehearing refused.

No. 1204.—ZENON GREMILLON, Administrator, v. CADET CROUSILLAC, et al.

The act of the sovereign power of the nation abolishing slavery annulled all contracts made in relation to the traffic in slaves, and the Courts are without power to enforce them.

The doctrine in the case of *Wainwright, Administrator, v. Bridges*, (ante page 234) reaffirmed.

**A** PPEAL from the District Court, Parish of Pointe Coupée, *Cooley, J. Lebeau & Beatty*, for plaintiff and appellant. *A. Provosty*, for defendant and appellee.

*Brief of Lebeau & Beatty, for plaintiff and appellant.*—This case presents but one question, namely: Were the slaves of Louisiana emancipated by the proclamation of President Lincoln, in January, 1863, or did they not in the eye of the law, continue to be slaves until the last Louisiana Convention in 1864, abolished slavery within our borders.

It must be admitted, that if the proclamation of the President of the United States produced the effect contended for by the defendant, the subsequent action of Congress, in its efforts to obtain the constitutional majority of the States, in its opinion, necessary to abolition; as also, the provision of our present State Constitution, tending to the same result, were supererogatory and delusive. Must we not rather conclude, that the proclamation was issued, as intended, to strike terror than to have any legal effect; and such, indeed, was the avowed intention of its author.

We deny, then, the constitutional power of the President to abolish slavery in the different States of the Union. The act was an arbitrary one, and produced no legal effect on the status of the slave.

In the argument of the lower Court this point is not conceded; was not strongly contested. The defendants mainly relied on the liberation of the slaves as effected by the first article of the constitution of 1864, by which they pretend they suffered eviction of the slaves for whom they gave the notes sued on.

They contend, that by the terms of the act of sale, with which the notes are identified, they had a special warranty against this very kind of eviction; and that, consequently, they are not bound to pay for property which has been wrested from them by the government.

In reply to this, we say that the warranty in the act of sale is couched in the usual notarial phraseology; prolix and verbose as it is, it adds nothing to the warranty which the purchasers would have had under the law.

Gremillon, Administrator, v. Crousillac et al.

Now, ever since there have been slaves in Louisiana, it has been known that it was within the range of probabilities, that the slaves therein might one day be freed; but who ever thought until now, that the vendors of slaves guaranteed against such an eventuality. The idea is preposterous. As vendors, we are not answerable for the action of the government; certainly not without a special warranty to that effect. The slaves we sold, ceased to be the property of the vendees by no fault of ours; not that they had not belonged to us in full property; not because they were not legally slaves for life, but by an act, in which defendant, as one of the people of Louisiana, is supposed to have participated, to wit: the emancipation clause in the present constitution.

We then contend, that when the defendant gave his notes, he had a valuable consideration for them. That he was fully aware when he made the purchase, that the slaves he bought might become free by the events of the war which was raging; that he exacted no special guaranty on this account; that up to the moment of the liberation, in 1864, he was their master; that they were lost to him as property by *vis major*, for which we are not responsible; and, finally, that according to the leading maxim, *res perit domino*, he, as their owner, at the moment they had ceased to exist as slaves, must bear the loss of their services in the same manner as if they had perished in an epidemic or earthquake.

*Brief of A. Provosty, for defendant and appellee.* \* \* \* The defence is, that the said negroes were warranted to defendant as slaves for life, and that on or before the said sale, the Southern States of this Union, including the State of Louisiana, having rebelled against the authority of the General Government, as a means of repression, and under the authority vested in him, the President of the United States had issued his proclamation, declaring free all the slaves in the State; and that since by the first article of the Constitution of the State, slavery was forever abolished throughout the State, thereby depriving respondent of all authority in, possession of, and title to said negroes sold as slaves; and that, therefore, the consideration for which said notes were given, has failed, etc.

It is admitted by the parties that the proclamations of the President of the United States, abolishing slavery, were issued before the sale of said negroes to defendant, and that the notes sued on were given for negroes described in the acts of sale marked A and B.

The case was submitted to a jury, who returned a verdict for the defendant; and judgment was rendered accordingly.

From the judgment, plaintiff has appealed.

This case involves the following questions:

1. Had the proclamations of President Lincoln the effect of abolishing slavery? or of so modifying the status of the negro, as to render him an unfit object of commerce; or at all events of depriving in fact the defendant of the use and possession of the property, for which he had given the notes sued on?

2. If the said slaves became free only under the new Constitution of Louisiana, is not the defendant entitled to judgment under the clause of warranty?

The defendant will rest the first question on the able charge given to the jury, by the Judge of the lower Court.

It is clear, that the Southern States claiming the rights of belligerents, subjected themselves to all the consequences of that position, and exposed to all the chances of the conflict, their possessions and their property, and everything that could augment their strength, and enable them to prolong the contest; and it did not belong to them as belligerents, to subject the acts of President Lincoln to the test of the Constitution and laws of the country; his proclamations, abolishing slavery, were therefore, so far as the Confederate States were concerned, the acts of the United States, and had all the effect which power could produce; and being ratified by Congress; and since the cessation of hostilities, confirmed by the people of this State, in convention, have now the sanction of the law, and must be held to be binding.

By said proclamations, therefore, the negroes sold as slaves became in fact free, and the obligations or notes of defendant given subsequently, were given without a cause, and can have no effect. C. C., Art. 1887, 1889, 1891; Toullier, vol. 6, p. 171, No. 167, No. 170.

The second is equally fatal to plaintiff.

The clause of warranty in the act of sale is ample: "Lequel a par ces présentes, déclaré vendre, céder transporter et abandonner dès a présent, et pour toujours, avec garantie de tous troubles, dons, dettes, évictions, hypothèques, alienations et autres empêchements généralement quelconques et avec substitutions," etc.

It is admitted, that defendant has been evicted, therefore, he can refuse the payment of the price. C. C., 2535. And he would recover the price if he had paid it, (C. C., 2481,) even if he knew of the issuing of the proclamation, and of its effect, (3d A. R., 327,) for the right of claiming the return of the price, after the eviction has taken place, exists in all cases, unless the party evicted, knowing the danger of eviction, took the property without warranty, and at his peril and risk. 5th A. R., 314; Troplong vente 480, 482, 483.

Le vendeur est déchargé de tous dommages et intérêts, mais en restant débiteur du prix—1o. Quand il y a stipulation de non garantie; 2o. Quand l'acte de vente étant muet sur la garantie, l'acheteur connaissait lors de la vente le danger de l'éviction. Marcadé, vol. 6, p. 259.

As in this case there is an express stipulation of warranty, defendant is not only entitled to retain the price, but might recover it with damages if he had paid.

TALIAFERRO, J. This action is predicated upon three several promissory notes, executed by the defendants *in solido*, in favor of the plaintiff, in his capacity of administrator. The notes are dated 17th January, 1863, and made payable consecutively in one, two and three years after date, with eight per cent. interest, from their respective maturities, the amount of each note being \$2,336 66.

The defence is, a failure of consideration, the notes having been given for the price of slaves, which it is alleged have been emancipated by the Government, and which, as property, have proved a total loss to the purchaser.

Gremillon, Administrator, v. Crousillac et al.

The case was tried in the Court below by a jury, which found in favor of the defendant.

Judgment was rendered accordingly, and the plaintiff prosecutes this appeal.

It is argued, in behalf of the plaintiff, that ever since there have been slaves in Louisiana, it has been known that it was within the range of probabilities that the slaves therein might some day be freed, and that this eventuality was never warranted against by any vendor, and that the happening of such an event was at the risk of the buyer.

On the part of the defence, the question is raised to what extent did the proclamations of President Lincoln go in effecting emancipation, or at least in depriving the defendant of the use and possession of the property for which he had given the note sued on? It is also noted, on the part of the defendant, that the proclamations adverted to were issued prior to the sale of the slaves in this case.

We do not consider it necessary to go into the consideration of these points. By the act of the sovereign power of the nation slavery was abolished; and that act, we have held, annuls contracts made in relation to the traffic in slaves, leaving the Courts without power to enforce contracts of that kind. See the recent decision in the case of *Wainwright, Administrator, v. Bridges*.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both Courts.

Justices LABAUVE and ILSLEY dissenting.

For the reasons assigned in our dissenting opinion, in the case of *Wainwright v. Bridges*, lately decided, we dissent in this case.

JOHN. H. ILSLEY,

Associate Justice.

ZENON LABAUVE,

Associate Justice.

No. 1271.—J. S. COURTNEY v. JOHN SHELTON—JOHN SHELTON v. J. S. COURTNEY.

The doctrine in the case of *Wainwright, Administrator, v. Bridges*, (ante page 234) reaffirmed.

**A**PPPEAL from the District Court, Parish of East Feliciana, *Posey, J. W. F. Kernan*, for appellant. *Fuqua & Kilbourne*, and *McVea & Hunter*, for John Shelton.

TALIAFERRO, J. The complex litigation in this case sprung out of an exchange of slaves by the parties in the year 1859. After a contest of seven years, and two trials by juries, the result was a defeat of both parties, with a decree of costs against Jettero S. Courtney, alternately, plaintiff and defendant.

The litigant last named has appealed.



Courtney v. Sheltoon—Sheltoon v. Courtney.

We are unable to render him relief. We feel constrained to act on the maxim, *denique sit finis quærendi*.

Any decision touching the subject-matter of the controversy would be vain and nugatory.

For the reasons given in the late case of *Wainwright, Administrator, v. Bridges*, decided by this Court, it is ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

Justices LABAUVE and ILSLEY dissenting, for the reasons given in the dissenting opinion of *Wainwright, Administrator, v. Bridges*.

JOHN H. ILSLEY,

Associate Justice.

ZENON LABAUVE,

Associate Justice.

No. 1315.—GEO. W. AMACKER v. G. W. AND L. J. VARNADO, Co-Administrators.—On Opposition to final Account.

A Judge of a Court, having formerly been counsel of record in a case brought before him for trial, while sitting as Judge on the bench, is incompetent to try the case: his duty is to refer the case to a competent Judge for trial. C. P. 337 and 338.

APPEAL from the District Court, Parish of St. Helena, *Ellis, J.*  
J. E. Wilson & T. C. W. Ellis, for plaintiff and appellee. E. F. Russell & T. G. Davidson, for defendant and appellant.

HYMAN, C. J. Under this title, the administrators of the succession of Celia H. Burton, deceased, filed a final account of their administration of the succession, which was opposed by George W. Amacker, on the ground that he was entitled to one-fourth of the succession in usufruct, the marital portion.

He prayed that the account be so amended and corrected as to allow him this portion.

E. P. Ellis was one of the attorneys, who signed the opposition of Amacker.

On the 5th May, 1864, a final judgment was rendered, recognizing opponent's marital portion to amount to \$2,309 93, and ordering the same to be paid to him, to be by him held in usufruct, etc.

This judgment was not signed.

On the 26th day of October, 1866, the opponent took a rule on the administrators, for them to show cause why the decree should not be signed *nunc pro tunc*.

One of the grounds taken by the administrators, in answer to the rule and in opposition thereto was, that E. P. Ellis, the Judge before whom the rule was to be tried, was the attorney for the opponent in obtaining the judgment sought to be rendered executory by his signature.

On the 20th of November, 1866, E. P. Ellis, the Judge, ordered the rule to be made absolute, and signed the judgment purporting to have been rendered on the 5th May, 1864.

The administrators have appealed.

Amacker v. Varnado.

The law, for wise purposes, has declared that, the parties may refuse to have their cause tried before a Judge, who has been employed or consulted as an advocate in the cause. See Code of Practice, Articles 337 and 338.

Our opinion is, that Judge Ellis had no jurisdiction of the cause after the administrators had attempted to recuse him. He had no right to decide on the rule, nor to sign the judgment. His duty was to refer the case to a competent Judge.

Let the judgment of the District Court be reversed, and let the case be remanded to be proceeded with according to law.

No. 1380½.—THE CITY OF NEW ORLEANS, CLAIMING EXPROPRIATION OF PROPERTY FOR PUBLIC USES.—In the Matter of the WRIT OF PROHIBITION, ISSUED IN THE CASE.

Clerks of Courts and sheriffs have the right, every six months after a suit has been instituted in any of the Courts of this State, to demand their costs from the plaintiff, and after authenticating the amounts due, to issue execution for the collection of them; this right is accorded to no other officer of the State. Revised Statutes, p. 124, § 7.

Experts, auditors and judicial arbitrators, are to be paid as well as the taxed cost, by the party cast at the termination of the suit.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*H. D. Ogden*, for City. *Collens & Wooldridge*, for defendant.

**TALIAFERRO, J.** The city of New Orleans, in its corporate capacity, instituted a proceeding in the usual manner, to have certain expropriations made of private property belonging to various individuals, in order to construct roads necessary for public use and benefit. A jury of freeholders was called, which, after hearing evidence, made their report; and the report, having undergone some modifications, was adopted and homologated by the Court of the Fourth District of New Orleans. In its judgment, the Court below awarded "to the members of the jury, collectively, for their services herein, eighteen hundred dollars." A suspensive appeal was prayed for by the city from this judgment, but refused. A short time after the motion was made for the appeal, one of the jurors, who had been called to act in the matter, caused a rule to be served upon the corporation, to show cause why the sum of one hundred and fifty dollars should not be paid him for his services, and upon the hearing of the rule he obtained an order rendering it absolute, and issued execution. The city, by its attorney, obtained from this Court a writ of prohibition, suspending the writ of *feri facias*, and staying further proceedings in the case until further order of the Court.

The subject is before us on the petition, order of prohibition, and answer.

On the part of the city, it is contended that the Court below, having rendered judgment for a certain fixed sum to the jurors, collectively, for their services, could not legally afterwards award judgment to one of them separately for his share, or supposed share of the entire amount. That this single juror, already having judgment in his favor in the aggregate, for

all that he is entitled to be paid for his services, cannot have judgment again for his part of the compensation. On the part of the juror, the plaintiff, in rule, it is held that the compensation is that made to experts appointed by the Court to perform specific services; that such compensation constitutes costs which are required to be paid before the termination of the suit in which they have been incurred; that experts being officers of Court, are entitled to be paid promptly their fees when they have accrued. We are referred to Code of Practice, Art. 552; to Revised Statutes, page 124, §7, and to various decisions of this Court. After an examination of all the references given, we are unable to find among them any warrant of law, authorising experts employed by Courts to proceed summarily, and to issue execution to collect the compensation allowed them for their services.

By the act of 1855, Revised Statutes, p. 124, § 7, clerks and sheriffs have the right every six months, after a suit shall have been instituted in any of the Courts of this State, to demand their costs from the plaintiff; and, after authenticating the amounts due, to issue execution for the collection of them. But to no other officers do we find this privilege granted. Compensation allowed to experts, auditors and judicial arbitrators is, by Article 552 of the Code of Practice, to be paid as well as the taxed costs by the party cast; and this implies a delay of payment until the termination of the suit. In matter of expropriation, perhaps the rule is different; as in those cases, the expenses of proceedings are borne by the party requiring the expropriation to be made. But, still we find no exception in favor of experts, which enables them to collect their compensation before the termination of the judicial proceedings incident in such cases to the settlement of the rights of the parties. The privilege granted to clerks and sheriffs to collect their costs every six months is founded upon obvious reasons, which do not apply to persons rendering isolated and casual services, and who are occasionally only and *pro re nata* officers of Court.

The case referred to in 10 Rob, page 150, recognizes the limitation of the privilege of collecting costs before the termination of the suit, to clerks and sheriffs. They can exercise that privilege only at intervals of six months. The plaintiff, in the matter now before us, if he had the privilege accorded to clerks and sheriffs, would seem to be premature in the exercise of it, for it appears that scarcely three months have elapsed since he rendered the services for which he claims to be paid.

The city (defendant in rule) has appealed from the judgment, fixing the compensation to proprietors, and awarding to the freeholders, acting as experts, eighteen hundred dollars for their services. That allowance might, upon sufficient evidence, be shown to be excessive, and be liable to reduction. In such an event, an anomalous state of things might arise, if the plaintiff were permitted to proceed with his execution to recover a larger amount than would be found due him. Upon the whole, we think the course he is pursuing irregular, and not sanctioned by law.

It is therefore ordered, adjudged and decreed, that the order of this Court rendered on the 30th of April, 1867, be made final, and the writ of prohibition then issued in this case, be perpetuated.

No. 1265.—HEZEKIAH POSEY, Administrator, v. JOHN MARTINGLEY et al.

The doctrine in the case of Wainwright, Administrator, v. Bridges, (ante page 234) reaffirmed.

**A**PPEAL from the District Court, Parish of West Feliciana, *Cooley, J. Collins & Leake*, for plaintiff and appellees. *S. J. Powell*, for defendants and appellants.

**TALIAFERRO, J.** This suit was brought to recover from the defendants the sum of eighteen hundred dollars, evidenced by two promissory notes, executed for the payment of the price of a slave purchased by one of the defendants, at a probate sale of property of the succession of Margaret Posey, deceased, in January, 1863.

The defence is, a failure of consideration, arising from the emancipation of slaves by the act of the sovereign power.

There was judgment for plaintiff, and defendants have appealed. The defendants have fully made out their case.

For the reasons assigned by this Court, in the case of *Wainwright v. Bridges*, it is ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; it is further ordered, that there be judgment in favor of the defendants, releasing them from all obligation to pay the notes sued upon, the plaintiff and appellee paying costs in both courts.

Justices **LABAUVE** and **ILSLEY** dissenting, for the reasons stated in the dissenting opinion of *Wainwright v. Bridges*.

**JOHN H. ILSLEY,**

Associate Justice.

**ZENON LABAUVE,**

Associate Justice.

No. 982.—**M. BERWIN v. STEAMSHIP MATANZAS, CAPTAIN AND OWNERS.**

The Civil Courts of Louisiana are without jurisdiction in admiralty and maritime cases.

By the judiciary act of 1789, chapter 20, § 9: *Exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction is vested in the District Courts of the United States, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

The saving clause, in the judiciary act of 1789, securing to suitors a common law remedy, where the common law is competent to give it, does not give them a remedy at common law, but a common law remedy. A proceeding *in rem* is a civil law remedy, and when used in the common law courts is provided for by statute.

**A**PPEAL from the Fifth District Court of New Orleans, *Leaumont, J. E. Filleul*, for plaintiff. *J. T. Tatum* and *H. B. Kelly*, for defendant.

*Brief of E. Filleul, for plaintiff and appellee.* \* \* \*

The defendant made a motion to set aside the sequestration, on several grounds, the first of which is: "Because the court has no jurisdiction in this case, which is one arising under the admiralty laws of the United States, and in which the United States Courts have exclusive jurisdiction."

The defendant, by cumulating other grounds with his plea to jurisdiction, has clearly waived it or rendered it unavailable; he pleads in the same motion that the affidavit is insufficient according to the laws of Louisiana, and that the surety is not such as the law requires. Such pleas are incompatible with the plea to the jurisdiction of the Court. The Court is bound to exercise its jurisdiction, to act upon what is the subject-matter presented for its decision, and, therefore, the plea to its jurisdiction is waived. See Code of Practice, Art. 338; 10 L. R. 228.

But let us look into that plea.

A cardinal principle in this matter is, "that the presumption is that a cause is not within the jurisdiction of the United States Court, until the contrary appears." *Lowry v. Erwin*, 6 R. R. 192.

The State Courts have concurrent jurisdiction, and the judiciary act of 1789, while it gives the Federal Courts exclusive jurisdiction of maritime cases, reserves to parties the right of a common law remedy, when the common law is competent to give it. *State v. Watts*, 7 L. R. 445.

But this is not a maritime case. The cause must arise wholly upon the sea, and not within the precincts of any county, to give the admiralty jurisdiction. If the action be founded on a matter done partly on land and partly on water, as if a contract be made on land to be executed at sea, or be made at sea to be executed on land, the common law has the preference, and excludes the admiralty. *Kent*, vol. 1, 419.

This case of seamen's wages, the Courts of common law admit to be of admiralty jurisdiction, and this is an exception in favor of seamen to the general rule, that the admiralty has no jurisdiction of any matter arising on land, though it be of a maritime nature, as a charter party, or a policy of insurance. *Kent*, vol. 1, p. 421.

The plea to the jurisdiction of the Court is clearly untenable. A simple examination of the record will show that the other grounds of the motion must share the same fate; they rest on no foundation.

*Brief for defendants and appellants.*

\* \* \*

The Court erred in refusing to set aside the sequestration. It was without jurisdiction of the case from the beginning. When jurisdiction is wanting *ratione materiae*, the Court is bound *ex officio* to notice it—consent of parties even cannot give jurisdiction; and the judgment of a Court wanting in such jurisdiction is null. C. P. 606, 608. 1 N. S. 200, 703. 3 N. S. 136. 14 L. 177. 6 R. 365. 11 R. 77. *Parson's Mar. Law*, vol. 2, p. 710, note.

It is apparent, on the face of the record, that the Fifth District Court of New Orleans was without jurisdiction of this action *ratione materiae*, for the reason that it is a case of admiralty and maritime jurisdiction, the exclusive cognizance of which by the Constitution of the United States, and the laws of Congress passed in pursuance thereof, is vested in the Courts of the General Government.

In the Constitution of the United States it is declared, in express terms, that the judicial power of the General Government "shall extend to all cases of admiralty and maritime jurisdiction." Const. U. S. Art. 3 § 2. *Benedict's Adm.* p. 12.



*Berwin v. Steamship Matanzas et als.*

By the judiciary act of 1789, ch. 20, § 9, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" is vested in the District Courts of the United States, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

If this is a case of admiralty and maritime jurisdiction, and if the remedy sought is not one which the common law is competent to give, the conclusion is inevitable that the State Court was without jurisdiction.

This is a case of admiralty and maritime jurisdiction. It is an action on a contract of affreightment.

"The primary and principal purpose of a ship is transportation for hire, and therefore contracts of affreightment are of admiralty and maritime jurisdiction." Benedict's Admiralty, § 286. See also Conkling's Treatise, p. 253. Parson's Mar. Law, vol. 2, p. 508, and note; Benedict's Admiralty, p. 31.

The remedy sought in this action is not a common law remedy, if indeed any remedies afforded by the Courts of Louisiana in civil actions can be so denominated. The whole proceeding, as it appears in the record, is utterly foreign and unknown to the common law system of remedial justice. Nor is the proceeding one, which could be had in the Courts of ordinary civil jurisdiction, under the system of jurisprudence from which that of Louisiana is mainly derived.

"The maritime ordinances of France have always been held in deservedly high estimation. Her wisest statesmen and monarchs have all along, through many centuries, given the most profound attention to the subject of maritime law; and under the administration of Courts of admiralty, filled by the ablest Judges, a system of maritime law has there been built up more perfectly than in any other country.

\* \* The jurisdiction of the French admiralty has always been of the widest and most salutary character. Benedict's Admiralty, p. 95, § 172. See also § 173, *et seq.*

"Les tribunaux d'amirauté connaissaient exclusivement entre toutes personnes de tout ce qui concernait la construction, les agrès et apparaux, avitaillement et équipement, vente et adjudication des vaisseaux, chartes-parties, affrètements, etc., et tout autre concernant le commerce de la mer." \* \* \* "Ils étaient

tribunaux privilégiés, ayant une compétence exclusive et privative, qu'on ne pouvait violer, sous peine d'amende. Du reste ils étaient tribunaux naturels et ordinaires pour les hommes et choses de la mer." Beausant, Code Maritime, Tome 1, p. 10. See also Loaré, Esprit du Code de Commerce, Livre 4, tit. 2, Art. 631-7. Code de Commerce, 631, 633.

Finally, the Supreme Court of the United States, in the case of the *Moses Taylor v. Hammons*, at the December term, 1866, have decided in a case entirely analogous to this, that the State Courts are without jurisdiction of a proceeding of this nature. A properly authenticated copy of the opinion of the Court will be furnished at the hearing of this case, and reference is made, in this connection, to the laws of the State of California, under which the case of *Hammons v. Moses Taylor* arose. Garfield and Snyder's Compiled Laws of the State of California, §§ 318-23, pp. 577-8. \* \*

TALIAFERRO, J. The plaintiff sues upon a contract of affreightment, alleging that he shipped on board the ship Matanzas, at New York, in November, 1865, one hundred and forty-four cases of merchandize, destined for New Orleans; that there was a failure on the part of the captain and officers to deliver nineteen of those cases according to the bill of lading. He claims judgment for \$1,741 55, as the value of the lost merchandize, with privilege on the vessel, and costs of suit, etc.

A writ of sequestration was taken out, under which the vessel was seized by the sheriff. The defendants released the seizure by entering into bond.

An exception was filed in the incipient stage of the proceedings to the jurisdiction of the Court, on the ground that the action being founded upon a contract of affreightment, the case is one exclusively of admiralty and maritime jurisdiction, and cognizable only by a Court of the United States. The exception embraced also an objection to the insufficiency of the affidavit, and also to the insufficiency of the bond, in the matter of the sequestration.

The exception was overruled, an answer filed, and after trial had, the Court rendered judgment in behalf of the plaintiff for the amount claimed, with judicial interest from judicial demand, and costs of suit. Defendants have appealed.

By the Judiciary act of 1789, ch. 20, § 9, *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, is vested in the District Courts of the United States, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

A case decided by the Supreme Court of the United States, in December last (1866) "*The steam-vessel, Moses Taylor, plaintiff in error, v. Wilson Hammons*," is adverse to the view formerly taken by many of the 9th section of the Judiciary Act of 1789, just referred. The Court say, in the case of the *Moses Taylor*, that "the contract for the transportation of the plaintiff was a maritime contract; it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a contract for the transportation of merchandise. The Court said: "The case presented, is clearly one within the admiralty and maritime jurisdiction of the Federal Courts." The decision settles the point, that over these cases the jurisdiction of the Federal Courts is exclusive. In conclusion, the Court remarked: "The case before us is not within the saving clause of the ninth section. That clause only saves to suitors "the right of a common law remedy, where the common law is competent to give it." It is not a remedy in the common law courts which is saved, but a common law remedy.

"A proceeding *in rem* is not a remedy *afforded* by the common law; it is a proceeding under the civil law. When used in the common law courts it is given by statute."

In the case now before this Court, the exception taken by defendants must prevail.

It is therefore ordered, adjudged and decreed, that the judgment of

the District Court be annulled, avoided and reversed; it is further ordered, that the case be remanded to the Court of the first instance, with directions to dismiss the action for want of jurisdiction. The plaintiff and appellee to pay all costs.

No. 1002.—PETER MARCY et al v. MERCHANTS' MUTUAL INSURANCE COMPANY.

The evidence of witnesses, as to what they heard from or were told by others, of orders having been issued, or given by the insurgent military authorities, then in possession of the city, for the destruction of property prior to, or about the time of the loss of the ship Pettigrew, was properly admitted as part of the *res gesta*.

In the margin of the policy of insurance of the steamer Pettigrew, the following clause appears: "Warranted by the assured free from all claim for loss or damage, arising from or growing out of the collision of foreign powers, or of our government with others." At the time this policy was affected, the city of New Orleans, the domicile of the insurance company, was in possession of the insurgents, engaged in armed rebellion against the United States. Just prior to the capture of the city by the Federal fleet, the insurgent military commander ordered the burning of all the cotton in and about the city. Under these orders the ship Pettigrew was destroyed by fire: *Held* That the destruction by fire of the ship Pettigrew, resulted from and grew out of the "collision" between the United States and the insurgents, then in arms against its authority; and the loss or damage growing out of that collision was not a peril insured against.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J.* *Buchanan & Gilmore*, for plaintiff and appellant. *A. & M. Voorhies*, for defendants and appellees.

*Brief of Buchanan & Gilmore, for plaintiff and appellant.* \* \* The question before the Court is not what ships were burned by military order on the morning of the arrival of the Federal fleet, but whether the evidence in this record shows that the Pettigrew was among the number of ships so destroyed, and if so, upon whom should the loss fall. Of course the law makes it incumbent on the defendants to make this proof, not by assumption or inference, but by clear and incontrovertible evidence. Have they done so?

Now, we say, if the Pettigrew was burned by military order, where is the order? The written order? If you cannot produce the written order by reason of its loss, as you say, (although no proof of any search or effort to obtain it is shown) where is the secondary proof? The evidence of those who gave it, or of those who saw and read it; or, if verbal, who heard the order given? The record is as silent as the grave on that subject. The defence has then entirely failed to show that the Pettigrew was destroyed by military command. This being the case, what has the evidence of the other eight witnesses to do with the question? Nothing at all. Their testimony is irrelevant, and as such it was objected to at the trial in the lower Court, and upon its being admitted, a bill of exceptions was reserved. That bill of exceptions is now insisted upon. It is ingeniously argued that the evidence forms part of the *res gesta*, and from it the Court is to infer a destruction of the Pettigrew by military order; and authorities are quoted in support of the argument. But it will be perceived, by an examination of the authorities, that they fall far short of the mark.

Take, for instance, the reference to Greenleaf on Evidence, § 108. There, it is said, that on the trial of Lord George Gordon for treason, the

cry of the mob, who accompanied the prisoner on his enterprise, was received in evidence as forming part of the *res gestæ*, and showing the character of the principal fact.

But did the persons who burned the Pettigrew accompany General Lovell? So far from it, the witness who relates the occurrence, tells us at the same time, that "there were no military in the vicinity," and that "I did not see any aid of General Lovell on that day about the levee." The other cases referred to are equally inapplicable. There the conversations bore directly upon the main fact, and tended to illustrate the motives and intentions of the actors.

There is then not that connection between the main fact, the burning of the Pettigrew, and the occurrences spoken of by the witnesses necessary to bring the evidence within the rule invoked by the defendants.

But as our adversary refers to historical facts in connection with the events of that period, we may likewise be permitted to assert that there was no order to burn ships.

There was an order to burn cotton wherever found, whether on ship-board or in the warehouses. If ships were burned, it was because they were loaded with cotton, or were supposed to have cotton on board.

The only witness that speaks with positive knowledge on that subject is Col. DeFeriet, who, on his cross-examination, says: "The order was to burn the cotton either in the presses or in the harbor. The order was special as to cotton, wherever it was. There were no orders to burn ships that had no cotton on board. The only ship I saw there had a load of cotton." And again, on his direct examination: "The order of General Lovell was verbal, to burn the cotton wherever it was. The order of the governor was in writing, to the same effect. I have not the written order."

Col. DeFeriet, it will be seen, commanded the Second Louisiana Regiment, and the order was transmitted to him. It was his duty to see it executed; and of course his evidence as to its character or purport, is more to be relied upon than the loose, vague and contradictory statements of subordinate military men, or of citizens who did not see it, and whose only knowledge of its contents is derived from rumor or hearsay. *His* is the only evidence on that subject deserving of attention.

There was then no order emanating from Confederate or State authority, to burn vessels generally; and the defendants have absolutely and entirely failed to show any order, either written or verbal, to burn the Pettigrew. The evidence shows that she was destroyed by persons, who, under the circumstances, and whatever may have been their motives, must be regarded as incendiaries; and the loss, being one covered by the policy, must be borne by the defendants. Angell on Fire Insurance, p. 165, §§ 134-8. \* \* \*

*Brief of A. & M. Voorhies, for defendants and appellees.* \* \* In the first bill, objection is raised against the admissibility of testimony to prove that "the ship, S. E. Pettigrew, had been burnt by order of the military, then in possession of the city of New Orleans, to the reception of which the plaintiff objected, on the ground that the same was irrelevant, and that the destruction of the property insured by third parties in

no wise authorized or sanctioned by the plaintiff, was no defence to the action upon the policy.

This objection goes to the effect, and not to the admissibility of the testimony; and, if correct in law, defeats the special defence that the loss of the ship was the result of a war risk, which had been reserved in the policy of insurance as a special warranty, assumed by the plaintiff himself.

The Court, therefore, properly admitted the evidence to prove a war risk, and overruled the objections to its admissibility.

The other bill of exception is found at page 49 of the record.

The burden of the complaint is, that the statements of several witnesses were improperly received, being hearsay declarations "as to what they heard from or were told by others, of military orders having been issued or given by the military authorities in possession of the city of New Orleans, for the destruction of property prior to or about the time of the loss of the ship S. E. Pettigrew; and also to all statements of facts by all said witnesses, or by either of them, which were not of their own personal and direct knowledge, upon the ground that such statements were mere hearsay, not the least evidence, and too vague and unreliable to serve the purposes of judicial investigation, or to control the rights of the parties to this suit."

Undoubtedly some of the witnesses did state what was said on the spot, where, and at the time when the Pettigrew and other vessels were being destroyed by fire. But, as the evidence was part of the *res gesta*, and, consequently, not strictly hearsay, the District Judge concluded that the objection went to the effect, and not to the admissibility of the testimony.

It is a historical fact, of which the Court will take judicial cognizance, that the Federal fleet had passed Forts St. Phillip and Jackson on the 25th day of April, 1862, and was on its way up the river to capture the city of New Orleans, then in the possession of the Louisiana State Government and of the Confederate authorities; and that the latter, in anticipation of this result, caused vessels, boats, docks and cotton to be fired, to prevent them (as was the invariable practice during the war) from falling into the hands of the Federal fleet and army. It was on this occasion that the Pettigrew was destroyed by fire, as well as several other ships or boats, some being loaded with cotton, while others were empty. The testimony introduced by the defendant merely corroborates this fact, and shows conclusively that these ships were destroyed to prevent their capture by the Federal fleet; that the military, including State and Confederate troops, were on the spot managing this affair; that Gen. Lovell and staff were there, besides other officers belonging to his command; that there were all along the river excited assemblages of the people, with whom at times the military mixed promiscuously; and finally, (besides the fact shown that orders were issued to perform this work) the general and his subordinates were present superintending the whole. Indeed, the Judge *a quo* knew something personally about these occurrences; like the Trojan chief, he might have said appropriately: "*Quorum pars magna fui*," since he had been officiating on that occasion in the capacity of a so-called Confederate officer, and hence, was well prepared on the trial below to better appreciate the facts.



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It was while the ships, docks, boats and cotton were burning, that were made the statements which are objected to as being hearsay. These statements were not only contemporaneous with the main fact under consideration, but were so intimately connected with it as to determine its character. They were part of the *res gestæ*, and cannot be severed from the main fact. As such they are original evidence, and form an exception to the rule decreeing the inadmissibility of hearsay testimony. See *Greenleaf Ev.* § 108, *et seq.*; *Marigny v. Union Bank*, 5 R. 354; *Lacaze v. Sejour*, 10 R. 444; *Duperrier v. Dauterive*, 12 An. 664. \* \*

TALLAFERRO, J. The plaintiffs in this case sue on a contract of insurance. They effected insurance with the defendants to the extent of \$7,000, on their interest in the ship *S. E. Pettigrew*, which was valued in the contract at \$40,000. The ship was insured from 27th of July to 27th of August, 1861. This insurance was renewed monthly up to March 27th, 1862, when it was again renewed for the period of one month, ending on the 27th of April, 1862. It appears that on the 25th of April, two days before the policy expired, the ship was destroyed by fire in the port of New Orleans. The insurers are sued for indemnity for the loss. The defence is, that the vessel was not lost by any of the perils insured against, and that the company is not bound to make good the alleged loss. The defendants had judgment in their favor in the Court below, and the plaintiffs prosecute this appeal.

In the margin of the policy of insurance, the following clause appears: "Warranted by the assured free from all claim for loss or damage arising from or growing out of the collision of foreign powers, or of our government with others."

It is under this condition of the contract, that defendant claims exemption from liability. They allege, in their answer, that the ship *Pettigrew* was destroyed by fire at the time a fleet of vessels of war of the United States was entering the port of New Orleans. That the burning of the vessel was by order of the military authorities then in possession of the city, and about to abandon it; that the act was authorized by the States then at war with the United States. It will be proper here to notice a bill of exceptions taken by the plaintiffs to the admission of statements made by several witnesses, as to what they heard from or were told by others, of orders having been issued or given by the military authorities then in possession of the city, for the destruction of property prior to or about the time of the loss of the ship *Pettigrew*.

The Court, we think, properly admitted the evidence as part of the *res gestæ*. One of these witnesses (*Brown*) testified that he "saw a mob go on board the *Pettigrew*, and fire her. There was no military in the vicinity. I was on the wharf; the crowd said they were going to fire all the ships at the wharves. They gave no reasons for this. They fired one of my ships."

*Tobleman*, a witness, stated: "I was stationed at the foot of *Clouet* street, as captain of a company. I saw *General Lovell* with his staff. He asked me where were my men? I answered they were busy at work. He told me, that inasmuch as the Federal fleet was coming up, to burn all the cotton and ships as soon as possible."

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G. D. Feriet, a witness, deposed that he was colonel of the Second Louisiana Regiment; that the orders to burn ships, and cotton in the presses, were transmitted to him; that there was an order first from the Governor and one from General Lovell, carried by an *aide-de-camp*. The order was positive, to burn all the cotton in the presses and in the harbor. "The order of General Lovell, to burn the cotton wherever it was, was verbal;" the order of the Governor was in writing, to the same effect. The testimony of many witnesses concurs in establishing the fact that at the same time the Pettigrew was burned a number of other vessels, and a large amount of cotton were burned at New Orleans. At that time excitement and consternation pervaded the city. A fleet of United States vessels of war had passed the forts below, and was advancing up the river. The purpose of the insurgent officers about to evacuate the city, it is satisfactorily shown, was to destroy all the cotton in New Orleans, wherever found, whether in the cotton-presses or on shipboard. It is matter of history, that at that time it was the policy of the so-called Confederate authorities to destroy cotton everywhere within reach of the United States forces. That there was an order to burn ships that had cotton on board, there cannot be a remaining doubt. The evidence, we think, conclusive, in favor of the defendants. That the destruction by fire of the ship Pettigrew, resulted from and grew out of the "collision" between the United States and the insurgent power then in arms against its authority, is satisfactorily established. It is plain, from the contract of insurance, that "loss or damage arising from or growing out of" that collision, was not a peril insured against.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

Rehearing refused.

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No. 996.—MANDEVILLE & MONTGOMERY v. BANK OF LOUISIANA.

Plaintiff deposited moneys in the Bank of Louisiana. The bank and all its assets, were afterwards seized, and taken possession of by order of the Commanding General of the United States Army, all the assets were turned over by the directors of the bank, including the deposit, to the quartermaster of the department. Plaintiff, a depositor, brings suit against the bank for the amount of the deposits still to his credit. The bank sets up in defence that these deposits have been seized and taken possession of by order of the Commanding General, and the bank is not again liable for their payment: *Held*—That the bank, having paid out all these deposits under an authority they had no right to question nor power to resist, they are no longer liable to pay them to the depositors; that obedience to the military order was full protection to the bank.

**A** PPEAL from the Sixth District Court of New Orleans, Duplantier, J. P. H. Morgan and J. H. New, for plaintiffs and appellants. Miles Taylor, for defendant and appellee.

*Reporter*.—In order to give a correct report of this case, it is necessary to publish the written opinion of the District Judge, in the case of *E. W. Dorr, Administrator, v. The Bank of Louisiana*, No. 17,163, on the docket, referred to by the Supreme Court for their reasons for judgment in this case. The opinion of the Judge *a quo* is as follows:

"The plaintiff in this case, acting in the capacity of administrator of the succession of the late J. A. Simpson, claims from the Bank of Louisiana the sum of twenty-six thousand six hundred and ten dollars, which he shows had been deposited in said bank to the credit of the deceased, in the years 1861 and 1862.

"The defence set up against the demand is that the bank is not liable to the plaintiff for the sum claimed, or for any part thereof, owing to the fact that under an order issued by the Commanding General of this department on the 17th of August, 1863, the several banks and banking corporations in this city were required to pay over, without delay, to Col. S. B. Holabird, Chief Quartermaster, or to such officer of the quartermaster department as the colonel might designate, all moneys in their possession belonging to or standing upon their books to the credit of any person registered as an enemy of the United States, or engaged in any manner in the military, naval or civil service of the so-called Confederate States, or who shall have been or may after the issuance of the order, be convicted of rendering any aid or comfort to the enemies of the United States. And that in compliance with said order, the aforesaid sum of \$26,610, then standing in the books of the bank to the credit of the deceased, was paid over to J. W. McClure, acting quartermaster, who was the officer delegated by Colonel Holabird, to receive the moneys referred to in the Commanding General's order, and who was at the same time one of the commissioners in charge of the effects of the bank, as liquidators under military appointment.

"The facts of the case are quite simple; they are such as represented by the pleadings, with this additional evidence, that J. A. Simpson, who died in December, 1863, was, at the time of his death, between sixty-three and sixty-seven years of age, and a resident of the State of Alabama, to which he had moved in the early part of 1863, from the State of Florida; that up to the day of his death, he was not employed in the armies of the so-called Confederate States; that he occupied no civil position whatever under the Confederate Government, and that he was not known to be otherwise than a loyal citizen of the United States.

"Under these state of facts, the question to be decided is this: Can the bank be held liable to the plaintiff as the administrator of Simpson's estate for the moneys which this latter had to his credit in the books of the bank, notwithstanding the fact that the bank has already paid over these moneys to the Acting-Quartermaster McClure, under the military order?

"On the part of the plaintiff, it is contended that when the money was paid to McClure, the relation in which Simpson and the bank stood towards each other was not that of depositor and depositary, but simply that of creditor and debtor; that the payment transferred no property of Simpson to McClure, but turned over to him the property of the bank; and hence, it is argued that the bank did not by the fact of the payment cease to be the debtor of the plaintiff, but still owes him, or rather his estate the amount claimed, notwithstanding the payment.

"It is evident that the real position, in which the contending parties stood towards each other when the payment was made to McClure was that

of creditor and debtor. Upon this question there can be no reasonable doubt; the deposit by Simpson with the bank, was not a special but an ordinary deposit; the bank had then the right to use his money; it became its own property, and the bank became at the moment of the deposit, the debtor of Simpson to the extent of the sum deposited. That doctrine is recognized in the cases of *Mathews, Finlay & Co. v. Their Creditors*, 10 An. 323; and *Simons v. Bean*, 10 An. 346, but, admitting the fact that Simpson was the creditor of the bank when McClure required of the latter a compliance with the order of the Commanding General, I am at a loss to conceive by what principle of law or of equity, Simpson could be justified in claiming to be still a creditor of the bank, notwithstanding the payment to McClure. The order of the Major-General, requiring the banks and banking corporations in this city to pay over to the chief quartermaster all moneys in their books, standing to the credit of the persons referred to in the order, was, in all respects, equivalent to a garnishment in the hand of the banks of all claims for money growing out of deposits which the parties named in the order held against the banks and banking corporations, and all payments made under the order was compulsory, and must necessarily operate a discharge in favor of the banks as would a payment made by a garnishee to a plaintiff in a regular garnishment process. What was seized upon, confiscated or sequestered, and taken possession of by McClure under the Major-General's order, was not the identical moneys which had originally been deposited by Simpson with the bank, and which at the very moment of the deposit became the property of the bank, nor was it the property, effects or moneys of the bank, but the property of Simpson himself; that is, his claim against the bank for moneys deposited.

"Hence, it follows that his claim being the thing confiscated, and taken by McClure from the bank, all his rights under it passed over to McClure under the order of the Major-General, and the payment made to McClure must necessarily have released the bank.

"But it is insisted that the order issued by the Commanding General on the 17th August, 1863, was unauthorized by law; that it did not reach Simpson, because he was not in the category of those persons contemplated by the Major-General, which is a fact that could have easily been shown by the bank; that for these reasons the bank should have resisted the enforcement of the order, and that its neglect to do so has worked upon the plaintiff an injury for which the bank should be held responsible.

"So far as the legality of the order is concerned is of no consequence here, for the bank had no right to question it; no more so than it had the right to put at issue its propriety, (*Foster & Elam v. Milsoe*, 2 Peters, 253,) but even if it did possess that right, it certainly had not the power to enforce the right, and it cannot, therefore, be accused of neglect for not doing what it had no power or means to do. Nor was it the province of the bank, or within its power, to determine whether or not the plaintiff was effected by the order; the determination of that question was evidently left with the military, for they alone had the means of ascertaining the status of every one. But, be that as it may, and conceding that the bank may be accused of gross negligence by the plaintiff; that

negligence would perhaps authorize a judgment against it in a suit for damages, but certainly not in this suit where no damages are claimed.

"But, furthermore, another circumstance in the case strongly militates in favor of the defendant. It is shown that when McClure received the amount of money standing to the credit of Simpson in the books of the bank, the latter was not under the administration of the directors. A commission of liquidators, of whom McClure was one, had taken possession of it; these had been appointed by the military, consequently their act in paying over the money to McClure was not, properly speaking, the act of the bank, but was the act of the military, for which it is neither just nor equitable that the bank should be made to suffer."

LABAUVE, J. The plaintiffs claim of the defendant the sum of \$13,963 64, which they allege they had deposited in the Bank of Louisiana; that the same has never been paid to them, although amicably demanded.

The answer contains a general denial, and further, that in virtue of divers orders issued by Major-General Banks, and particularly one directed to Capt. T. M. McClure, to take possession of the balances of persons who left the city on its occupation by the Union troops, and have not returned, and hold them for the government, subject to any just claims that be made against them, the said sum of \$13,963 64 was withdrawn from the bank by said T. W. McClure, and that said bank is not responsible.

The District Court gave judgment for defendant, and the plaintiffs appealed.

There is no dispute about the facts.

The Judge *a quo*, in giving judgment, said:

"This case being identical, in every respect, with that of *E. W. Dorr, Executor, v. The Bank of Louisiana*, No. 17,163, of the docket of this Court, the reasons assigned for a judgment in that case, must apply to this case."

We have carefully examined that opinion, which is found in the record, and we fully concur with our learned brother of the District Court, and for the reasons by him assigned, the judgment appealed from must be affirmed.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, with costs.

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NO. 1394.—STATE OF LOUISIANA v. J. L. DENNETT.

It is sufficient, to establish the forgery of a check and the signature thereto, to show a similarity between the spurious check and the genuine one, such as to create a possibility of fraud.

The statute of Louisiana introduced no change in the common law, as to the distinctions in degrees of insanity; it merely directed the action of juries, in a case where a prisoner, upon the general issue of not guilty, was acquitted for that cause.

**A** PPEAL from the First District Court of New Orleans, *Howe, J.*  
W. W. Handlin, for appellant. C. H. Luzenberg, for the State.



ILSLEY, J. The prisoner was tried and convicted on an information for forgery, and sentenced to the penitentiary for the term of five years.

Several points are relied on in this Court for a reversal of the verdict of the jury, and the judgment of the District Court, which are presented in the following order:

1. That the Court refused to charge the jury that the State must show that the checks charged to have been forged by the prisoner, and the signature thereto affixed sufficiently resemble the genuine checks and signatures of Paul Duyan, to deceive persons of ordinary business observation, otherwise it is not a forgery, and the prisoner must be acquitted.

The Court did not err in refusing so to charge the jury. In *Rex v. Mary Mazagora* reported in Russell and Ryan's British Crown Cases, vol. 1, page 291, it was decided by the twelve Judges of England, that "a jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution it would not be likely to impose on him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument if genuine, did not enter into the prisoner's contemplation."

If there be at any time a bare possibility of fraud, it is enough to constitute the offence. Wharton's American Criminal Law, 1846, page 338, *United States v. Turner*, 7 Peters 132. Archibald's Criminal Pleadings, (1840) 346.

Several bills of exception were also taken by the prisoner's counsel to the refusal of the Court below:

1. To allow a paper marked L, purporting to be a report of physicians to show the insanity of the prisoner, to be received as evidence, and also to permit the counsel of the prisoner to examine his client on that point.

2. To admit, in evidence, a letter from a person addressed from Portsmouth, N. H., in answer to a letter from the prisoner's counsel, in order to show the former history of the prisoner and his insanity, and also to admit the evidence of the former counsel of the prisoner, to show in the opinion of one of them, who was not precluded, the prisoner was insane.

The grounds of objection to this evidence are not stated in the bill of exception, except as to the opinion of the counsel, which was objected to as hearsay.

The Court did not err in rejecting the evidence of the counsel, to prove the opinion of his colleague; it was hearsay. The other matters raised by the bills cannot be noticed, as no grounds are stated in the bills upon which the evidence was excluded.

3. To charge the jury that they had the power to acquit, if they found insanity in any degree, however slight it might be; and that the statute of the State of Louisiana does not, as the English law, make distinctions in degrees of insanity or mental derangement.

The Court did not err, in refusing thus to charge the jury. The statute of Louisiana introduced no change in the common law, as to the distinctions in degrees of insanity; it merely directed the action of juries, in case a prisoner upon the general issue of not guilty acquitted any person for that cause. R. S., sec. 21.

Nor did the Court in refusing to permit the counsel for the accused to hand his notes of evidence taken down by him to the jury, to be taken by it into the jury-room.

And finally, the Court did not err in its refusal to arrest the judgment for the reasons stated in the motion, viz: that the report styled "*inquisition*" of larceny, was not allowed to go to the jury, although made before the trial, and because the notes of evidence made by the counsel were not allowed to be handed to the jury. These were not legal grounds to be urged in arrest of judgment.

It is therefore ordered, that the judgment of the District Court be affirmed.

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NO. 1278.—STATE OF LOUISIANA v. S. H. KENNEDY & Co.

The power of Congress to regulate commerce with foreign nations, and the States of the Union is complete in itself, and has no limitations, other than are presented by the Constitution.

Under the 2d clause of the 10th section of the 1st Article of the Federal Constitution, the States are without power to impose any duty or tax upon any property imported into their territorial limits, while the imported articles remain the property of the person sending them there for sale, or while it remains in its original form or packages.

The State of Louisiana cannot tax property brought here from other States of the Union, for sale or reshipment, until it has been mixed with and forms a part of the common mass of the property of the State.

An agent or commission merchant domiciliated in this State, receiving property on consignment from another State for sale on commission, cannot be taxed on the amount of the gross sales made of the goods in their original form, or packages, where he accounts to the owner (a non-resident) for the price obtained, less his commissions for making the sale.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J.* *Andrew S. Herron, Attorney-General*, for the State. *Campbell, Spoford & Campbell*, and *C. Roselius*, for defendants and appellees.

*Brief of A. S. Herron, Attorney-General, for the State.* \* \* The State seeks to recover from defendants the sum of one-quarter of one per cent. on the amount of their gross sales and receipts, as commission merchants and vendors of produce, between the first of July, 1865, and first of January, 1866. The State also claims twenty per cent. on the amount of their tax, as a penalty for their failure to pay said tax according to law.

The third section of the act of 4th of April, 1865, p. 150, provides: "There shall be assessed and collected the sum of one-quarter of one per cent. on the annual gross sales or receipts of each and every person pursuing any trade, profession or occupation, whose annual receipts exceed the sum of two thousand dollars."

"All persons pursuing any trade, profession or occupation within the limits of the city of New Orleans, shall render to the auditor of public accounts, at his office in New Orleans, within ten days after the passage of this act, a statement, under oath, of all gross sales effected by them or receipts from the 1st day of July to the 31st day of December, 1865, and shall pay into the State treasury the amount of said tax at the time of rendering such statement. It shall be the duty hereafter of each and every person liable for this tax to render a like statement, and make set-

tlement within the first ten days of every quarter; and any person failing to comply with the provisions of this act shall be liable to a penalty of twenty per cent. upon the amount of tax due, to be collected in the same manner as other taxes." Act of 1866, p. 46.

The joint resolution approved March 10th, 1866, Acts 1866, p. 138, extends the time of payment provided for in the above act until the 15th of March, 1866.

Under the legislation above referred to, the defendants are liable for the tax and damages claimed from them, unless it appear that the act imposing the tax is in violation of the Constitution of the United States or of the Constitution of this State. The defendants contend it is violation of both.

It is urged that the act in question is in conflict with: 1st. The second clause of the tenth section of the first Article of the Constitution of the United States, which provides "that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States."

2d. Also, with the third clause of the eighth section of the first Article, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Does the prohibition, contained in the second clause of the tenth section, first Article, include articles and merchandize brought into one State from another State, or does the word "imports" mean articles, etc., brought into the United States from abroad, from foreign countries?

It is submitted that this prohibition refers exclusively to "imports" from foreign countries. Such, it is thought, is the universal acceptance of the term, as well as the interpretation placed upon it by the highest authority.

In the *License* cases, 5 Howard 594, Mr. Justice McLean says: "And it is supposed that the declaration 'that no State, without the consent of Congress, shall lay any impost or duties on imports or exports,' except what may be absolutely necessary for executing its inspection laws, refers to foreign commerce."

Again, he says: "The word import, in a commercial sense, means the goods or other articles brought into this country from abroad—from another country. In this sense, an importer is a person engaged in foreign commerce, and it appears that in the acts of Congress which regulate foreign commerce, he is spoken of in that light."

Mr. Justice Catron, in the same case, says: "Had the gin imported been an 'import' from a foreign country, then the license law prohibiting its sale by the importer would be void." 5 How. p. 601.

Mr. Justice Daniel, same case, p. 614, says: "Imports, in a political or fiscal, as well as in common practical acceptance, are, properly, commodities brought in from abroad, which either have not reached their perfect investiture or their alternate destination as property within the jurisdiction of the State, or which still are subject to the power of the government for a fulfillment of the conditions upon which they have been admitted to entrance," etc.

It is evident, from a careful examination of the case of *Andrew Pierce et al v. The State of New Hampshire*, one of the "License cases" above quoted from, that the Court must have adopted the interpretation here contended for, as the majority of the Court recognize the correctness of the decision in *Brown v. Maryland*, 12 Wheaton 419; that a State was without Constitutional power to require a license from an importer before he was permitted to sell in the original package; and the facts in *Pierce v. New Hampshire* are, that Pierce brought from the State of Massachusetts, into the State of New Hampshire, a barrel of gin, and sold it in the cask in which it was brought, without the license required by the law of New Hampshire, certainly affording, in every respect, a parallel case with that of *Brown v. Maryland*, if the word "imports," in the clause of the Constitution, means "articles," etc., brought from one State into another, as well as those brought into the country from abroad. And yet the Court sustain the law of New Hampshire, requiring the license.

Mr. Justice McLean, in the same case, 5 Howard, p. 594, says: "In *Brown v. The State of Maryland*, 12 Wheaton 413, the Court say: 'The act of Maryland denies to the importer the right of using the privilege which he has purchased from the United States until he has purchased it from the State.' And it was upon the ground that the tax was an additional charge or impost upon the thing imported which a State could not impose, that the above act was held to be unconstitutional.

But neither the facts nor the reasons of that case apply to a person who transports an article from one State to another. In some cases the transportation is only made a few feet or rods, and generally it is attended with little risk, and no duty is paid to the State or Federal Government. And why should property, when conveyed over a State line, be exempt from taxation which is common to all other property of the State?

If the foregoing opinions be considered correct, the prohibition under discussion does not refer to goods and articles brought into one State from another.

McCulloch's Commercial Dictionary, *verbis*, importation and exportation: "The bringing of commodities from and sending them to other countries."

In support of the proposition above, as well as the basis of argument on other points in the case, the following fundamental authorities (which of course will only be controverted as to their proper application) are submitted:

Art. 10. Amendments to the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." A cardinal principle now invoked as a good starting point in the investigation of all questions of conflict between the action of States and the Federal Constitution, and to the same purport is the interpretation found in the 32d number of the *Federalist*.

"An active consolidation of the States into one complete national sovereignty, would imply an entire subordination of the parts, and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the

rights of sovereignty which they before had, and which were not by that act exclusively delegated to the United States. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union; and, in another, prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*. I use these terms to distinguish this last case from another which might appear to resemble it, but which would in fact be essentially different. I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority." \* \*

"A case which may, perhaps, be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and co-equal authority in the United States, and in the individual States. There is plainly no expression in the granting clause which makes that power *exclusive* in the Union. There is no independent clause or sentence which prohibits the States from exercising it; so far is this from being the case, that a plain and conclusive argument to the contrary is deducible from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission, that if it were not inserted the States would possess the power it excludes; and it implies a further admission that as to all other taxes, the authority of the States remains undiminished," etc,

"If goods sold by defendants are not "imports" from abroad—from another country—they are liable to taxation by the State, unless that taxation is in conflict with the clause of the Constitution, empowering Congress "to regulate commerce with foreign States, and among the several States," etc.

Is the tax, under the Act of 1865, a regulation of commerce among the States, or between this State and another, or other States? In what respect is it so? The act appears to be simply and purely a tax on the gross sales or receipts made by persons in the State, without discrimination or distinction as to what they sell or where the goods are brought from, whether they were manufactured or produced in Louisiana, or elsewhere. No discrimination is made against goods or articles from other States; none in favor of State productions; no impost or other duties are charged on goods from other States before they are allowed to come into the State, or before they can be sold; no license is exacted from the seller (by the act in question) before he is allowed to sell; he is not compelled to sell; his goods are not taxed while in his hands, and before sale. In every respect, goods and articles brought into the State from another State, and sold here, are treated exactly as goods or articles raised or manufactured in the State are. There is no attempt in the act to regulate commerce, directly or indirectly. It is simply a legitimate exercise of the taxing power.



How is this power restricted in the States by the Constitution of the United States. It is limited by the clause we have hereinbefore considered, prohibiting the States from laying duties on imports or exports, and as to tonnage.

A State is also prohibited from taxing the means or instruments which are employed by Congress to carry into execution powers conferred on that body by the Constitution. Beyond this it is thought, under a proper construction, according to the fundamental authorities above quoted, there is no constitutional restriction upon the sovereign powers of the State to tax everything which exists by its own authority, or is introduced by its permission.

In support of the foregoing proposition, the following authorities are quoted:

"It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised on every object brought within its jurisdiction. This is true. But to what source do we trace the right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may be almost pronounced self-evident."

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not," etc.

Chief Justice Marshall's opinion of the Court in *McCullough v. State of Maryland*, 4 N. 429.

In this case it is decided that a State tax on the operations of the Bank of the United States, is unconstitutional. One of the restrictions upon the power of the States is shown in the decision, but the reasoning of the Chief Justice demonstrates the correctness of the position, that the power is plenary and general, and that the restrictions are exceptional, and of course must clearly appear to be recognized.

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic.

"This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature. This vital power may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract against

unjust and excessive taxation, as well as against unwise legislation generally." Chief Justice Marshall's opinion of the Court in *Providence Bank v. Billings*, 4 Peters, p. 563.

Again, in the same case, the Chief Justice says:

"That the taxing power is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed." \* \*

"But as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear."

The *License* cases, 5 Howard, p. 573, already quoted from, are again referred to, and an extract from the opinion of McLean, J. subjoined:

"The owner of the property who purchased it in Massachusetts, and transported it to New Hampshire, is not an importer in the sense in which that term is used in *Brown v. Maryland*. And there is nothing in the general reasoning of that case, or in the facts, which can bring into doubt the constitutionality of the New Hampshire law."

"If the mere conveyance of property from one State to another shall exempt it from taxation, and from general State regulation, it will not be difficult to avoid the police laws of any State, especially by those who live at or near the boundary. If this tax had been laid on the property as an import into the State, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress. One of the objects in adopting the Constitution was to regulate this commerce, and to prevent the States from imposing a tax on the commerce of each other. If this power has not been delegated to Congress, it is still retained by the States, and may be exercised at their discretion, as before the adoption of the Constitution. For, if it be a reserved power, Congress can neither abridge nor abolish it. But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license. The right of an importer of foreign spirits to sell in the cask, without a license, does not attach to the plaintiffs in error on account of their having transported this property from Massachusetts to New Hampshire."

This is the opinion of one of the Judges, believing, as defendant's counsel in this case do, that the power to regulate commerce among the States has been exclusively given to Congress. His opinion is clear, that the levying a tax on articles sold in the original package by the person bringing them into one State from another, is not a regulation of commerce among the States, and this, too, where the tax is by way of license before sale, a stronger case than the one before you, where the tax is only levied after sale.

In *Gibbons v. Ogden*, 9 Wheaton, p. 201, Marshall, C. J. in delivering the opinion of the Court, says:

"We must first determine whether the act of laying duties or imposts on imports or exports is considered in the Constitution as a branch of the

taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section, 'Congress shall have power to lay and collect taxes, duties, imposts and excises', and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The Constitution then considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports, is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the State on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition on this subject. The prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce."

If this able commentary be correct, the deduction irresistibly drawn from it is, even if the power in Congress to regulate commerce is exclusive, that the only restriction upon the taxing power of the State is found in the prohibition contained in the clause relative to "imports and exports;" they being, as contended above, articles brought in from foreign countries, the power to regulate commerce embracing no prohibition, consequently there is no prohibition against taxing articles brought into one State from another.

Mr. Justice Taney, in the *Passenger* cases, 7 Howard, 480, after endorsing and affirming the above doctrine very fully, says:

"I may, therefore, safely assume that according to the true construction of the Constitution, the power granted to Congress to regulate commerce did not, in any degree, abridge the power of taxation in the States; and that they would at this day have the right to tax the merchandise brought into their ports and harbors by the authority, and under the regulations of Congress, had they not been expressly prohibited.

"They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far, their taxing power over commerce is restrained, but no further. They retain all the rest, and if the money demanded is a tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objection to it unless it is a duty on imports or a tonnage duty, for these alone are forbidden."

Justice Woodbury, in *Passenger* cases, 7 H. 531: "The power of taxation generally, in all independent States, is unlimited as to persons and things, except as they may have been pleased, by contract or otherwise, to restrict themselves. Such a power, likewise, is one of the most indispensable to their welfare, and even their existence. \* \* \* But in all cases of doubt, the leaning may well be towards the States, as the General Government has ample means, ordinarily, by taxing imports, and the States limited means, after parting with that great and vastly

increased source of revenue connected with imports. The States may, therefore, and do frequently tax everything but exports, imports and tonnage as such. They daily tax things connected with foreign commerce as well as domestic trade. They can tax the timber, cordage and iron, of which the vessels for foreign trade are made; tax their cargoes to their owners as stock in trade; tax the vessels as property, and tax the owners and crew per head for their polls. Their power, in this respect, travels over water as well as land, if only within their territorial limits."

Mr. Justice McLean, rendering the opinion of the Court, in *Nathan v. Louisiana*, 8 H, 82, says:

"The taxing power of a State is one of its attributes of sovereignty, and where there has been no compact with the Federal Government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the General Government; and, as laid down by this Court, it may be exercised at the discretion of the States. The only restraint is found in the responsibility of the members of the Legislature to their constituents. If this power of taxation by a State, within its jurisdiction, may be restricted beyond the limitation stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws, and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no Federal power, under the Constitution, which can impair this exercise of State sovereignty."

The extract below, from a decision of our own Supreme Court, is also in point:

"We cannot conceive that a question can arise (in the case before the Court) under the Article of the Constitution quoted. All taxation upon property within one State may remotely affect commerce with a sister State. Thus, a tax upon stores may increase the price of merchandise brought here by merchants from abroad; a tax upon warehouses, the price of the storage from the Western States, and a tax upon our markets may enhance the price, or perhaps curtail the quantity of supplies brought to them. Yet these taxes have never been questioned. It is only when a regulation of commerce by a State directly affects commerce with a sister State, that a question can arise whether the grant to Congress to regulate commerce between the States is exclusive." Preston, J., opinion of the Court in *Union Towboat Company v. Bordelon*.

It is thought the foregoing authorities establish clearly that the tax on gross sales or receipts is simply a legitimate exercise of the taxing power, and in no manner a regulation of commerce; nor is it even an indirect interference with the regulation of commerce.

However, even if the tax in question should be considered a regulation of commerce between the States, it is contended it would not thereby be repugnant to the Federal Constitution.

It is thought that, although the doctrine that the "power to regulate



commerce," etc., is an exclusive one in Congress, has occasionally found earnest and able advocates, the great weight of authority is arrayed against any such construction.

It will be found, it is thought, that many of the opinions relied on by counsel, in support of the proposition, when closely examined, are far from sustaining it.

First. The case of *Brown v. State of Maryland*, from which counsel quote very fully, and of which they say: "The extracts we have made from the opinion of the Supreme Court, in the important and leading case of *Brown v. Maryland*, and the fullness of the opinion itself, would seem to render it a work of supererogation to add more," will be found not to decide the question now before this Court.

Extracts are subjoined, showing the opinions of Justices of the Supreme Court, as to what was decided by the Court in the above case:

Chief Justice Taney, after a very full and cordial endorsement and approval of the doctrine sanctioned by the Court, in *Brown v. Maryland*, says, in the *License* cases, 5 Howard, p. 578: "The present case, however, differs from *Brown v. The State of Maryland*, in this—that the former was one arising out of commerce with foreign nations which Congress had regulated by law—whereas the present is a case of commerce between two States, in which Congress has not exercised its power."

Mr. Justice McLean, same case, p. 594, after quoting from *Brown v. Maryland*, the words: "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State." "This remark of the Court was incidental to the question before it, and the point was not necessarily involved in the decision. Whilst the remark cannot fail to be considered with the greatest respect, coming, as it did, from a most learned and eminent Chief Justice, yet it cannot be received as authority. It must have been made with less consideration than the other points ruled in that important case."

In another place, same decision, he says, speaking of *Brown v. Maryland*: "But neither the facts nor the reasons of that case apply to a person who transports an article from one State to another."

Mr. Justice Catron, after stating his opinion as to what was decided in *Brown v. Maryland*, says: "Neither of these cases touch the question of exclusive power, nor do I suppose it was intended by the writer of the opinion to approach that question, as he studiously guarded the opinion in the leading case of *Gibbons v. Ogden*, against such an inference, and professedly, followed the doctrines there laid down in *Brown v. The State of Maryland*." *License* cases, 5 Howard, p. 604.

In the same case, p. 618, Mr. Justice Nelson concurred in the foregoing opinions of the Chief Justice, and Mr. Justice Catron, Mr. Justice Daniel in the same case concurs, but goes further than the other Judges, not even recognizing the correctness of the decision in *Brown v. Maryland*, on the points therein decided as to foreign imports, and as to the regulation of foreign commerce. 5 Howard, p. 612.

These opinions, it is submitted, show:

1st. That the question as to the exclusiveness of the power in Congress to regulate commerce is not affirmed in *Brown v. Maryland*, and

2d. In the *License* cases themselves, it is decided that such power is not



exclusive, and that too, on a state of facts very similar to those of the case before you. The only difference being in favor of the present case, where no tax is levied until after actual sale, while in the other, the tax or license was required to be paid before sale.

2. The case of *Gibbons v. Ogden*, 9 W. 200, one relied on by the advocates of the exclusive-power doctrine, as sustaining their views, still less, if possible, than *Brown v. Maryland*, affirms that doctrine.

I quote from the opinion of the Court, in the above case: "In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a State regulate commerce with foreign nations, and among the States, while Congress is regulating it." Instead of this case deciding the power in Congress to regulate commerce to be exclusive, the opinion, in very positive terms, asserts that it *dismisses from the case* the inquiry into that question.

In speaking of *Gibbons v. Ogden*, after quoting from the case of *Wilson et al v. Blackbird Creek Marsh Co.*, Mr. Justice Catron says: "In the case of *New York v. Miln*, Mr. Justice Thompson and Mr. Justice Story differed entirely as to what the language employed in the opinion in *Gibbons v. Ogden* meant, in regard to the true exposition of the Constitution; one contending that the language used had reference to the power of Congress, and to a case where it had been fully exercised; the other, insisting that the opinion maintained the exclusive power in Congress to regulate commerce, and that the States had no authority to legislate, but were altogether excluded from interfering. This was Mr. Justice Story's opinion. I think it must be admitted that Chief Justice Marshall understood himself as Mr. Justice Thompson understood him, otherwise he could not have held as he did in the last case, in 1829, of *Wilson v. The Blackbird Creek Marsh Co.* And as this case was an adjudication on the precise question, whether the Constitution of the United States, in itself, extinguished the powers of the States to interfere with navigation on tide-water, and as it was adjudged in the case of *Gibbons v. Ogden*, that the powers to regulate commerce included navigation as fully as if the clause expressed it in terms, it is difficult to say that this case does not settle the question favorably to the exercise of jurisdiction on the part of the States, until Congress shall act on the same subject, and suspend the State law in its operation. *License cases*, 5 Howard, p. 605.

Mr. Justice Daniel, in *Passenger cases*, 7 Howard, p. 500, says: "As the case of *Gibbons v. Ogden* has been much relied on in the argument of these cases, and is constantly appealed to as the authoritative assertion of the principle of exclusiveness in the power of Congress to regulate commerce, it is proper here to inquire how far the decision of *Gibbons v. Ogden* affirms this principle so often and so confidently ascribed to it; and after all that has been said on this subject, it may be matter of surprise to learn that the Court, in the decision above mentioned, so far from affirming that principle, emphatically disclaims all intention to pass upon it," and much more to the same effect.

*Gibbons v. Ogden*, I submit, does not sustain the exclusiveness in Congress of the power to regulate commerce.

3. The *Passenger* cases, 7 Howard, 393, are also relied on as sustaining the views of defendants on the constitutional questions under discussion. An examination of the opinions of the Justices will, I think, show the very reverse.

Mr. Justice Wayne, whose individual opinion is clearly that the power to regulate commerce is exclusively vested in Congress, says: "Before stating, however, what they are, it will be well for me to say that the four Judges and myself, who concur in giving the judgment in these cases, do not differ in the grounds upon which our judgment has been formed, except in one particular, in no way at variance with our united conclusion; and that is, that a majority of us do not think it necessary in these cases to reaffirm, with our brother McLean, what this Court has long since decided, that the constitutional power to regulate commerce with foreign nations, and among the several States, is exclusively vested in Congress, and that no part of it can be exercised by a State."

It is evident that the question was not decided by the majority of the Court, as they agreed positively not to decide it.

Another fact is also certain and patent, that a majority of the Court at the time the decision in the above case was rendered, were of opinion that the power to regulate commerce is not exclusively conferred upon Congress.

1. Mr. Justice Catron, in the *License* cases, decided only two years before the *Passenger* cases, rendered a full, elaborate and able opinion on this subject of exclusiveness, in which he holds the opinion that the power is not exclusive. In the *Passenger* cases he expresses no opinion in conflict with the previous opinion. He was one of the majority concurring in the opinion of the majority, and withholding in the case any expression of opinion on the subject of the exclusiveness of the power. Hence, it is concluded that his opinion was still against the exclusive power. 2. C. J. Taney. 3. Mr. Justice Daniel. 4. Mr. Justice Woodbury. Each delivered full and able opinions against the doctrine of exclusiveness of power in Congress. 5. Mr. Justice Nelson fully concurs with the Chief Justice's opinion, "not only in its conclusions, but in the grounds and principles upon which it is arrived at."

Justices McLean and Wayne alone express opinions in favor of the doctrine of exclusive power in Congress, and of these Justice McLean, in the *License* cases, did not consider an article brought from one State into another an import. Nor did he consider there was any violation of the Constitution in its taxation; such taxation, in his opinion, not being a regulation of commerce. I think, then, that the *Passenger* cases cannot be quoted as sustaining the exclusive power in Congress to "regulate commerce with foreign nations and among the States."

4. The case of *Hays v. The Pacific Mail Company*, is no authority in this case; the facts, as shown, were that the vessels taxed were in California, were they were taxed, "but temporarily engaged in lawful commerce with their *situs* at the home port; as said by Campbell, J., "the material fact is that the vessels were in transitu, having no *situs* in California, nor permanent connections with its internal commerce."

It may very well be, that the goods in *transitu* through a State, and there temporarily, could not be taxed, and yet the power to tax remain unimpaired where goods are brought into one State from another, and are brought into competition with the goods of the State and sold, thus forming "a permanent connection with its internal commerce."

5. The case of *Almy v. California*, 24 How. 169, it is contended, "is important to show that the Court regard the inter-State commerce as standing upon the same ground, as to constitutional protection, as foreign commerce, and that the closing paragraph cited from the opinion in the case of *Brown v. Maryland* has been judicially adopted, in a case arising in the commerce between two States of the Union."

At first blush the position appears a strong one, but it is thought a careful investigation will show its strength to be merely in appearance and not in reality. It is true that the case of *Almy v. California*, was one in which the shipment of gold was made from California to New York, and in that case the law of California imposing a stamp duty or tax upon bills of lading for gold, gold dust, etc., was decided to be repugnant to the Article in the Federal Constitution, prohibiting the laying of duties on exports. But it is also the fact that the act of California in question was applicable to the exportation proper of gold, etc., to foreign countries, and for that reason, and to that extent it certainly was beyond all question unconstitutional. It is also true that the point in controversy in this suit, as to whether commodities brought from one State of the Union into another constitute "imports and exports," under the meaning of the Article of the Federal Constitution, was not directly raised or argued by counsel, or even alluded to in the reasoning of the Court in its decision. It is submitted that the weight of this authority cannot be deemed equal to that of the *License* cases, where the point in question is directly made and fully discussed, and the opinion of the majority of the Court, including Chief Justice Taney, who rendered the decision in *Almy v. California*, clearly at variance with this pretended authority. Now, if the interpretation placed upon this decision be correct, how can we reconcile the apparent contradictory positions of the Chief Justice in the two cases? For there is clearly antagonism between the two. Not only is the opinion attributed to him in *Almy v. California*, inconsistent with his opinion and that of the majority of the Court in the *License* cases, but it is irreconcilable with his opinion in the *Passenger* cases quoted above. It is not absolutely impossible that he should have intended not only to change his own twice matured and deliberately expressed opinion, but should also deliberately overturn the well-advised decision of the Court itself, upon a vastly important constitutional question, without even alluding to these previously expressed opinions and decisions?

The Court will perceive, in the opinion in *Almy v. California*, that all of the illustrations in argument refer to "foreign countries," "other countries," etc., and not one word is said upon the point in controversy, in this case, as to the distinction and difference between articles brought from one State of the Union into another, and articles brought from a foreign country into the Union. Whatever else it was intended to decide, I think we may surely conclude it did not contemplate the decision of the point at issue in this case.

6. The New York case, quoted by defendant's counsel, appears to be merely a decision under the law of New York, and does not appear to undertake the solution of the constitutional questions submitted to this Court for its decision.

7. The opinions of Mr. Madison, from debates on Federal Constitution, I think, on close examination, will not be found antagonistic to the decisions of the Supreme Court relied upon by the State, and so copiously quoted from above.

It is submitted that the following authorities are conclusive upon the subject of the exclusive "power of Congress to regulate commerce," etc:

In *Wilson v. The Blackbird Creek Marsh Co.*, 2 Peters 250, Chief Justice Marshall, in delivering the opinion of the Court, says: "The counsel for plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.' If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce—the object of which was to control State Legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States—we should not feel much difficulty in saying that a State law which came in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States—a power which has not been so exercised as to affect the question."

In a recent case, 3 Wallace, 732, *Gilman v. Philadelphia*, the Court say, speaking of the power to regulate commerce: "Until the dormant power of the Constitution is awakened and made effective by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this Court."

The dissenting opinion, by Mr. Justice Clifford, is not at variance with the above doctrine, but contends that "Congress has legislated so as to deprive the State of Pennsylvania, in the case before the Court, from doing so." Vide opinion in full.

The following additional cases are cited as in point on the foregoing proposition—"power of Congress to regulate," not exclusive: No. 32, Federalist. *Houston v. Moore*, 5 W. 49; *Sturgis v. Crowninshield*, 4 W. 193.

It is submitted that even in case the Court should deem the tax imposed by the act of the Legislature of Louisiana a regulation of commerce, unless it should appear that the said regulation is in violation of some legislation of Congress, also regulating commerce, it is nevertheless not repugnant to the Constitution of the United States.

If the State law is of even doubtful repugnancy to the Constitution, the Court will not be authorized to declare its nullity.

"The question whether a law be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy



of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatibility with each other." C. J. Marshall, opinion of the Court in *Fletcher v. Peck*, 6 Cranch 128.

In *Brown v. Maryland*, Chief Justice Marshall says, p. 437, 12 W.: "It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies such constitutionality. The plaintiffs in error take the burden upon themselves," etc.

Mr. Justice Daniel, *Passenger* cases, 496, 7 Howard, says: "The question whether a law be void for its repugnancy to the Constitution, ought seldom, if ever, to be decided in the affirmative in a doubtful case. It is not on slight implication or vague conjecture that a legislature is to be pronounced to have transcended its powers, and the acts to be considered void. The opposition between the Constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatibility with each other;" and many others.

Is the act of 1865 repugnant to the Constitution of the State? Is the tax assessed uniform? The Article 124, or the corresponding articles in previous Constitutions have, on the subject of uniformity, been fully interpreted by the Supreme Court of our own State.

The rule proclaimed in this article is but the reiteration of a great fundamental principle, which lies at the foundation of all well organized governments, that taxation must be uniform and equal; and while we are disposed to give to it its fullest force and effect, we are unable to discover in what it is repugnant to the act of 1842 or the act of 1850. To be uniform, taxation need not be universal. Certain objects may be made its subjects, and others may be exempted from its operation; certain occupations may be taxed, and others not; so some occupations may be taxed for a greater amount, and others for a less; but as between the subjects of taxation in the same class, there must be an equality." *State of Louisiana v. The Widow and Heirs of Pogdras*, 9 An. p. 165.

"If we consider this class of exactions as falling within the purview of the first clause of Article 123, still we think it constitutional, because it operates uniformly upon all persons of the same class, to wit: all keepers of coffee-houses. The defendant is required to pay the State what other keepers of coffee-houses are required to pay, no more and no less." *State v. J. Rebassa*, 9 A. 305.

It is clear that this article has reserved the right of the Legislature to exempt any property it deems fit from taxation altogether. But if it tax at all, then says the Constitution, it must tax equally or in a uniform ratio, according to an assessment legally made, all property of the same description upon which a tax is levied." 10 An. 736, *New Orleans v. Commercial Bank*.

"Upon the question of constitutionality, it is only necessary to repeat what was said in the case of the *State v. Rebassa*, 9 An. 305, that the license tax in question operates uniformly upon all persons of the sam



class, to wit: all keepers of coffee-houses. It is, therefore, constitutional." *City of New Orleans v. J. A. Staejer*, 11 An. 68.

Wherein consists the want of uniformity in the act of 1865? It levies a uniform tax of one-quarter of one per cent. on *all* gross sales or receipts, exempting from its operation only those whose gross sales or receipts are under two thousand dollars. It is a uniform and equal tax upon all gross sales or receipts of a certain class; that is, all over two thousand dollars; those under two thousand being exempt, and forming a class not taxed. Cannot this exemption be made by the sovereign power of the State? Conceding, however, for the argument, that such an exemption is not uniform, wherein is the want of uniformity, and consequent repugnancy to the State Constitution? It clearly is only in that feature of the law taxing the first two thousand dollars of sales or receipts of those whose entire sales or receipts are more than two thousand. In this consists, if in anything, the only violation of the State Constitution, which can be corrected by the tax collector conforming to the Constitution, and not exacting the tax from any one on the first two thousand dollars, and in the powers of the judiciary to prohibit and prevent the enforcement of the law, so far as it is unconstitutional.

How are the defendants, and to what extent are they affected by this unconstitutional feature, if it be unconstitutional? Certainly only in being called on to pay the tax on the first two thousand dollars. If the Court should be of opinion that the exemption of some without the exemption of all to the same extent, is repugnant to the Constitution; it is perfectly competent for the Court to render judgment against defendants for the amount claimed, less the tax on the first two thousand dollars of their gross sales.

Our Courts have decided that where a portion of a law is unconstitutional, and only a portion, that the law is good and binding in all other respects, wherein it is in conformity to the Constitution. *Williams v. Payson*, 14 A. 7.

It is urged that the authorities (decisions of our Supreme Court) heretofore cited, are inapplicable under the provisions of Article 124, Constitution of 1864, which, it is contended, are substantially different from those of Art. 123, Constitution of 1852.

Is this so? The first clause in both Constitutions is in the same words: "Taxation shall be equal and uniform throughout the State."

The second clause in the Constitution of 1852, is: "All property on which taxes may be levied in this State shall be taxed in proportion to its value, to be ascertained as directed by law."

Second clause in Constitution of 1864, omit words "on which taxes may be levied in this State."

The third clause of Constitution of 1852, is omitted in that of 1864: "No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied."

The concluding portions of the articles, respectively, are as follows:

Constitution of 1852: "The Legislature shall have power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession."

Constitution of 1864: "The General Assembly shall levy an income

tax upon all persons pursuing any occupation, trade or calling; and all such persons shall obtain a license, as provided by law. All tax on income shall be *pro rata* on the amount of income or business done."

The following clause in the Constitution of 1864, is not contained in the Constitution of 1852: "The General Assembly shall have power to exempt from taxation property actually used for church, school or charitable purposes."

Is the omission, in the second clause of the words, "on which taxes may be levied in this State, such an alteration of the provisions of the Constitution of 1852, as to make it imperative on the Legislature to tax every species and article of property in the State, without any exception whatever; and in case of any omission or exemption, the tax imposed to be null and unconstitutional?

Does this omission in any way alter the effect of the article? Is not the direction to the Legislature in fact substantially the same in both articles? If it had been intended to give the article the meaning claimed by defendants, would it not have used direct and specific language indicating such intent?

The substantive requirement of the clause, evidently, is not that *all property* shall be taxed, but that *all property shall be taxed in proportion to its value*; that is, in substance, what is required by Article of Constitution of 1852. The object of the article, in other words, being directly to secure the taxation of property according to value, and not to secure the taxation of all property.

If it be urged that the inference is to be drawn from the mere omission of the words "on which taxes shall be levied in this State; that the intention was to enforce specifically the taxation of all property, may it not as well be inferred that the omission of the next clause in the Constitution of 1852 from that of 1864: "No one species of property shall be taxed higher than another species of property of the same value on which taxes shall be levied," authorizes the taxation prohibited by the omitted clause?

It is contended by defendants' counsel that the position that all property must be taxed, is strengthened by the clause authorizing the exemption of property actually used for church, school or charitable purposes. They argue that under the rule *inclusio unius est exclusio alterius*, the conferring of special power to exempt from taxation property used for certain purposes, amounts virtually to a prohibition to make any exemption other than that authorized.

The rule, it is submitted, is improperly invoked in the interpretation of the powers of a State Legislature, which, in its proper sphere is supreme, unless prohibited by the Federal or State Constitution. Unlike the Federal Congress, it requires no authorization to act, but must be prohibited to prevent action.

I think it will be found that the special authorization to exempt property used for certain purposes was rendered necessary by the clause requiring uniformity and equality of taxation. Without such special authorization, the property of the same class and kind taxed generally in hands of others, could not be exempted because owned or used for certain particular purposes. This special authorization in no way derogates from

the heretofore conceded general power to exempt vested in the Legislature. In this act there is no exemption; the first two thousand dollars are merely not taxed. It is uniform, no exceptions being made among those who are taxed.

If the Court should be of opinion that the tax imposed by the law is a tax on property; that is, on the proceeds of the sale of goods sold by defendants, then there is no repugnancy in the act to the Article of the Constitution. If it should be considered an income tax, under the last clause of Article 124, Constitution 1864, it is in no manner violative of that article. It is a tax *pro rata* on the amount of "business done," equal and uniform in all respects.

The opinion of the Judge of the Court below is confined to the decision of only one of the questions involved in the case. He decides against the constitutionality of the tax on the ground that commodities brought from one State of this Union into another are "imports," and if sold in the original packages in which imported, any tax on that sale is an impost duty, prohibited by the Federal Constitution. I think a careful application of the principles decided by the Supreme Court of the United States above referred to, will demonstrate his opinion to be erroneous.

It is argued that "the history of the United States discloses that while the Union consisted of but thirteen States, with a population of only three millions of people, the conflicting regulations of the States upon the subject of commerce, and the disposition of those communities to throw the burdens of government upon strangers, were serious impediments to the prosperity and harmony of the Union. It was a material cause for the formation of the Federal Constitution. To remove the jealousies and discontents, and to prevent the injustice arising from such dispositions, the power to *regulate commerce with foreign nations, and among the States*, was conferred on Congress, and the power to levy duties on imports and exports was taken away from the States." This is all perfectly true, and all of the evils experienced under the original articles of confederation are completely guarded against by the fair and wise interpretation of the Articles of the Constitution by the Supreme Court, which does not go to the extent contended for—of trammelling and controlling the legitimate taxing power of the States within their own limits exercised in the case before the Court, without violating either of the articles referred to.

*Brief of Campbell, Spofford & Campbell, for defendants and appellees.*—This cause was determined in the District Court in favor of the appellees. That Court decided that the requisition made upon the appellees was a tax upon imports from another, or other States than Louisiana, and that such a tax was violative of the Constitution of the United States.

That it is a tax there is no question. The 3d section of the Act of 865 forms a part of the regular revenue law of the State. The words of the section are "that there shall be assessed and collected the sum of one-quarter of one per cent. on the annual gross sales or receipts of each and every person pursuing any trade or occupation."

Nor is there any serious dispute that this is a tax upon imports from another State.

The evidence in the cause is free from all ambiguity. The facts proved show that the sales upon which the assessment has been made, consist wholly of the property of persons residing in other States; that this property was prepared in those States for the market of New Orleans; that the sales made were of the property of those persons, in the same state and condition in which it was prepared; and that the money arising from the sales made was their money to be accounted for to them, and subject only to the charges of the agents they had employed to make the sales on their account.

There were arguments employed in every other case that has arisen on this subject that cannot be used in this case. The suit is brought for the collection of the tax itself. It is not a question arising upon the failure to take a license, or for selling without a license, or for failing to obtain a stamp upon a commercial document, or upon any collateral undertaking.

The admissions leave no doubt as to the precise question raised in this cause.

There can be no doubt, that if the property sold by the appellees were property imported from a foreign country, the Court would not hesitate to affirm the judgment.

The case in that aspect would be embraced within the letter and spirit of the case of *Brown v. State of Maryland*, 12 Wheaton 410.

The question before the Court is then reduced to the enquiry, whether imports from another State are within the same exemption as imports from a foreign country?

The language of the Constitution is: "No State shall, without the consent of Congress, lay imposts or duties on imports or exports except," etc., etc. We need not enquire of the exceptions.

The prohibition is universal; it has no limitation as to time or place or circumstance, except the circumstances of previous consent of Congress, or the necessity of executing inspection laws.

State power, under no circumstances, could affect property by taxation that was not brought within its limits. The prohibition of the Constitution protects all property which falls under the denomination of things imported, and all property denominated as exports. In neither case does the place of production, or of destination, form any condition upon which the prohibition is made to be operative.

No State shall \* \* \* levy any imposts or duties on imports or exports.

Is there anything in the history of the clause which serves to modify its unqualified language?

The history of the clause furnishes the most satisfactory exposition we can make of the signification it should have.

The Declaration of Independence published and declared: "That the United Colonies were free and independent States;" "and that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent States may or might do."

In 1778 these States adopted their Articles of Confederation, whereby their separate and independent character was materially altered.

The 4th Article of the Confederation provided: "The better to secure and perpetuate mutual friendship and intercourse among the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof, respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State, of which the owner is an inhabitant; provided, also, that no imposition, duties or restriction shall be laid by any State on the property of the United States, or either of them."

The 3d section of the 6th Article provides: "No State shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince or State, in pursuance of any treaties already proposed by Congress to the Courts of France and Spain."

The first section of the 9th Article, confers upon Congress "the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the 6th Article, of sending and receiving ambassadors, entering into treaties and alliances; provided, that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever."

Under the Articles of Confederation, then, this was the condition of the organic law upon this vital subject. Congress had no power to impose duties on imports or exports, or to impose any restrictions upon the States, by any commercial treaty which might thereafter be made to the disfranchisement of the people of any State, or which inhibited any prohibitory regulations of the States, either upon imports or exports.

The States had the right to lay such duties as they chose upon imports from abroad, or from any of the States, subject only to the condition that Congress might place foreigners upon the footing of citizens, as to trade, by treaty.

That there was granted to the citizens of the States a privilege of egress and regress—the faculty of removing the property imported to another State, of which the importer was an inhabitant.

These articles of confederation were found to be ineffectual to a vigorous prosecution of the war with Great Britain, and jeopardized the success of the revolution. They were found to be inefficient to the construction of a firm, stable and prosperous Union, after the establishment of independence by the treaty of peace in 1783.

Their imbecility was demonstrated in the articles we have quoted above, and to amend those articles was the main object of the Convention of 1787, and the most prominent result of the Constitution adopted in 1789.

A reference to documentary evidence will show that the power reserved



to the States over commerce, was found to be attended with inconvenience, and mischief *ab initio*.

New Jersey addressed a memorial to Congress on the subject in 1778.

In 1781, Dr. Witherspoon, one of the wisest of the statesmen of the revolution, presented a resolution, declaring, "it is indispensably necessary, that the United States in Congress assembled, should be vested with a right of superintending the commercial regulations of every State, that none may take place that shall be partial or contrary to the common interest."

The resolution of Virginia in 1786, appointing her commissioners to meet commissioners from those States, expresses their purpose to be "to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations may be necessary to their common interest and permanent harmony."

This resolution was superinduced by a resolution of Mr. Madison, in the House of Delegates of Virginia in 1785, the preamble of which is as follows: "Whereas, the relative situation of the United States has been found on trial to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities which cannot fail to arise among the several States from the interference of partial and separate regulations," etc., etc.

At the adoption of the Federal Constitution, there was not a State in the Union in which there did not exist a variety of commercial regulations. These fell, by common consent, upon the adoption of that Constitution.

The revenue system of the United States prior to the formation of the Constitution, was a source of as much confusion, and provoked as much anxiety and discontent as did the commercial system.

The United States had no power to collect a revenue for themselves. They were dependent upon the States, who were required to pay their quotas according to a constitutional rate of assessment. These quotas were, for the major portion, unpaid. In 1781, Congress made a requisition for \$8,000,000. Fifteen months after the requisition was made, only a half-million of dollars had been collected.

Congress urged upon the States to grant them the power to lay duties on imports. This plan was sent to the States, accompanied by an address prepared by Mr. Madison, in which the necessity of the measure and the claims of national honor, public faith, duty to the suffering army, to the creditors, who in time of need had stripped themselves, that the war of independence might be prosecuted; and finally, the peril to the public safety, arising out of a disordered finance, were all luminously set forth. All this was ineffectual.

The year 1786 found the country in the same condition of confusion and dishonor. That year was devoted to securing a call for a general Convention. That Convention met in the spring of 1787.

The Constitution then adopted and submitted to the people for ratification in September, 1787, contains two clauses, which are material in the present inquiry. These clauses are:

"Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

"No State shall, without consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress."

"No State shall, without consent of Congress, lay any duty on tonnage."

There cannot be a question, that the power to regulate commerce with foreign States, among the several States, and with Indian tribes, involves the whole subject of intercourse with and between any of those governments or organizations.

The international law, treating men as formed for society, and capable of intelligent intercourse and connections, speaks of commercial intercourse as a mutual right; that it is free and open to all. But that governments, having the guardianship of these natural rights, and a power to regulate and to restrain them, may, according to their policy, impose restraints and require conditions upon which their natural rights may be exercised.

The general state of international commerce has been, and continues to be, that of restriction and mutual imposition. The inter-State commerce of the United States has heretofore been free, and to that cause as much as to any other, may be attributed its vast development, and the rapid growth of the country in material prosperity. The power granted to the United States to regulate commerce among the States has been exercised by excluding all imposition or impediment to it.

The second quotation we have made from the Constitution, shows the sedulous care which the framers of the Constitution exhibited in protecting the commerce of the country from State regulation. The most tempting form for State interference with commerce, is that under their power of taxation. There is a rooted opinion among all classes, that taxation in the form of duties, on imports or exports, fall upon the foreigner, and that we levy our revenue in such cases out of the pockets of the stranger. A legislature rarely resists the temptation of doing so, reckless of consequences. But the necessity that exists in this country for uniformity of regulations, to prevent foreign entanglements and internal animosities and discontents, induced the framers of the Constitution to impose negative clauses, interdicting the taxation of imports or exports, without the consent of Congress.

Mr. Madison has preserved, in his debates, the precise history of these prohibitive clauses.

In the draught of the Constitution, as reported from the committee, Articles 12 and 13, were as follows:

Art. 12. "No State shall coin money, nor grant letters of marque, nor enter into any treaty, alliance or confederation, nor grant any title of nobility."

Art. 13. "No State, without the consent of the Legislature of the

United States, shall emit bills of credit, or make anything but specie a tender in payment of debts, nor levy imposts or duties on imports; nor keep ships of war in time of peace; nor enter into any agreement or compact with another State, or with a foreign power." \* \* \*

On the 28th of August, 1787, Mr. Madison moved: "That the words, 'nor lay imposts or duties on imports,' be transferred from Article 13, where the consent of the General Legislature may license the act, into Article 12, which will make the prohibition on the States absolute. He observed, that as the States interested in this power, by which they could tax the imports of their neighbors passing through their markets, were a majority, they could not give the consent of the Legislature to the injury of New Jersey, North Carolina, etc.

"Mr. Williamson seconded the motion.

"Mr. Sherman thought the power might safely be left to the Legislature of the United States.

"Col. Mason observed, that particular States might wish to encourage, by impost duties, certain manufactures, for which they enjoyed natural advantages, as Virginia, the manufacture of hemp," etc.

"Mr. Madison: The encouragement of manufactures in that mode requires duties, not only on imports directly from foreign countries, but from the other States in the Union, which would revive all the mischiefs experienced from the want of a general government over commerce."

On the question—

"New Hampshire, New Jersey, Delaware, North Carolina, aye—4; Massachusetts, Connecticut, Pennsylvania, Maryland, Virginia, South Carolina, Georgia, no—7.

Article 12, as amended, was then agreed to, *nem con*.

Article 13 was then taken up.

"Mr. King moved to insert, after the word 'imports,' the words, 'or exports,' so as to prohibit the States from taxing either; and, on this question, it passed in the affirmative—

"New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, North Carolina, aye—6; Connecticut, Maryland, Virginia, South Carolina, Georgia, no—5.

"Mr. Sherman moved to add, after the word 'exports,' the words, 'nor with such consent, but for the use of the United States;' so as to carry the proceeds of all State duties on imports or exports into the common treasury.

"Mr. Madison liked the motion, as *preventing all State imposts*, but lamented the complexity we were giving to the commercial system.

"Mr. Gouverneur Morris thought the regulation necessary to prevent the Atlantic States from endeavoring to tax the Western States, and promote their interest by opposing the navigation of the Mississippi, which would drive the Western people into the arms of Great Britain.

"Mr. Clymer thought the encouragement of the Western country was suicide on the part of the old States. If the States have such different interests that they cannot be left to regulate their own manufactures, without encountering the interests of other States, it is a proof that they are not fit to compose one nation.

"Mr. King was afraid that the regulation moved by Mr. Sherman,

would too much interfere with the policy of States respecting their manufactures, which may be necessary. Revenue, he reminded the House, was the object of the General Legislature.

On Mr. Sherman's motion—

"New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, aye—9; Massachusetts, Maryland, no—2.

3 Madison Debates, 1445, 1446, 1447.

An examination of this debate shows that in the arrangement of this clause, there was a pervading disposition among the members to prevent the States from taxing imports in their transit from one State to another; that the suggestion of Col. Mason that the States might desire to protect their manufactures, was answered that such protection could only be made by taxing inter-State commerce, which would revive all the mischiefs experienced from the want of a general government over commerce; that on the motion of Mr. King, the prohibition was enlarged to embrace exports; that the clause of prohibition was intensified, by adding to the conditions on which Congress might allow taxes on imports or exports, that no portion of the money should go into the State treasury.

The remarks of Mr. Madison and Gouverneur Morris, show the sentiment that operated upon the Convention.

The results obtained by the action of the Convention are described by Mr. Curtis, in his history of the Constitution, and Judge Story's Com. on Con., §§ 1013, 1061, 1067. 2 Curtis' His., 368, 369, 370.

The whole foundation of the Attorney-General's argument is, that this prohibition refers exclusively to imports from foreign countries. "Such, it is thought, is the universal acceptance of the term, as well as the interpretation placed upon it by the highest authority."

We have looked in vain for that "highest authority," which the learned Attorney-General refers to. The observation of Judge McLean certainly proves nothing. Imports into the United States undoubtedly means foreign importations, and in the laws of the United States imports refer certainly to foreign productions. Because, the United States embraces all the States, and imports into any part of the United States, as respects the revenue laws, means a foreign import. But the inquiry is, what is the meaning of imports, as regards each individual State, in the clause of the Constitution that prohibits taxes on imports and exports? We have seen the occasion for the clause in the Constitution, and that it does refer to any imports into the State, whether as resulting from foreign or internal commerce.

To proceed to the examination of the *License* cases, which form the reliance of the Attorney-General. In those cases, there is no opinion of the Court as a Court. The Judges, being unable to agree upon an opinion, they severally expressed their own views. The case, therefore, is not one of much authority. For the several Judges have expressed such a variety of views that no common opinion can be collected. The Supreme Court of the United States, in 2d Wallace, 730, (*Gilman v. Philadelphia*) thus describes the result of the judgment: "But a State, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another State, to be sold by retail, or to be sold without a license."

In examining the case in New Hampshire, it will be seen upon what grounds the Courts of that State defended the validity of their statute, and what exceptions were made to their decisions, and what were presented by the writ of error to the Supreme Court of the United States.

The Courts of New Hampshire determined that the requirement upon a vendor of spirituous liquors to obtain a license, before making a sale, and upon his failure to do so, subjecting him to a penalty, was not a tax, although the property sold came from another State, and that it did not fall within the clause of the Constitution, imposing a tax on imports.

The same Court charged the jury, that the Legislature of New Hampshire could not regulate commerce between the States, nor prohibit the introduction or sale of commodities from another State; but that a State might pass health laws and police laws, which would, to a certain extent, affect foreign commerce, and commerce between the States, and that this statute was a regulation of this character. 5 How. S. C. R. 556 and 598, in Catron's opinion.

It will be seen that the two points presented were, was this demand for a license, as a qualification to the faculty of selling liquors, to be regarded as a tax, or was it to be regarded as a police regulation, to avoid the noxious influence of unlicensed sales of intoxicating liquors?

The requirement of the license may not have been a tax at all; no charge may have been made for one, or so small a charge, as to preclude the belief that any revenue was expected. It may be that inquiries of the character of the license, and the obligations imposed upon him, showed clearly that the object of the law was to prevent the spread of intemperance. In this aspect, there could be no ground for asserting that this penal law was a revenue measure.

Supposing the law had been that upon all spirituous liquors sold, there shall be paid to the State five per cent. of the amount. The Court of New Hampshire could not then have said, that as no tax had been levied no question arose under the constitutional prohibition.

In the case of *Brown v. Maryland*, 12 Wheat. 410, the law imposed a prohibition upon sales by importers, until they should pay for their license \$50. This applied to the entire body of importers, and to the importers of all commodities. Nothing was required of an importer but the payment for the license. There was no consideration for the money but the grant of the privilege to sell, and that would be granted to anyone for the money.

The license laws of New England, on the contrary, grant a discretion to the police courts, in reference to the number and character of the licenses. Those licenses are placed under restrictions, as to the quantity to be sold, for use on their premises, and are subject to punishment if they suffer a man to drink to intoxication in their houses. These and other conditions induced the Court to say that the question involved was not one of taxation.

Upon the second question involved, in the case from New Hampshire, the Supreme Court were all agreed that the law was constitutional, and the majority of the Court agreed to this upon the ground that is declared in the Supreme Court of New Hampshire.



The argument upon this precise point was placed by Mr. Justice Greer, in a very clear and distinct light.

The diversities of opinion that existed in the Court, in reference to the extent in which the States might make regulations affecting the means and machinery of commerce, appeared in the discussions on the *Passenger* cases, reported in 7 How. 283.

These cases involved three questions: 1st. Whether the power to regulate commerce extended to embrace immigrant and other passengers; whether a tax upon the ship or immigrants, for the purpose of creating a fund for maintenance and relief of that class, was prohibited by the Constitution or acts of Congress. A majority of the Court decided the tax laws to be unconstitutional. The Court gave no opinion, and the majority concurred in none, although Mr. Justice Wayne collated, compared, and apparently with the consent of the Judges, announced the conclusions.

I consider the separate opinions of the Judges of that Court as of no great importance in settling a question. The opinions of the Court, as a Court, are made up after consultation—after an expression from each Judge—and the opinion of the Court is submitted, and adopted in conference before read in the Court.

The separate opinion of a Judge is not read in conference, not canvassed, and binds no one afterwards as authority. For this reason I do not refer with much stress to anything that has been said, either in the *License* or *Passenger* cases.

In a later case, involving the pilotage laws, *Cooley v. Wardens of Philadelphia*, 12 How. 300, the dissent in the Court was much diminished, and a principle laid down more practical than those that appeared in previous discussions. The Court admitted, that there were some matters of commercial regulation to which State power could not extend, and there were others to which State power could extend in the absence of controlling regulation. But that such was the variety and extent of the operations of commerce, that no exact and precise demarcation between State and Federal power could be authoritatively announced in a single case.

"The power to regulate commerce embraces a vast field," say the Court, "containing not only many, but exceedingly various subjects, quite unlike in their nature—some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every part; and some, like the subject now in question, imperatively demanding that diversity which can alone meet the local necessities of navigation."

We have followed the train of the Attorney-General's argument with a view of showing that it is outside of the case before the Court.

We have no cause for inquiry, whether this is a regulation of commerce by the State, which infringes the exclusive authority of Congress, or whether it may be reconcilable with the admission of the power of Congress, in the absence of congressional regulations. The Constitution has not left the subject of our inquiry in any doubt. It has declared that "no State, without the consent of Congress, shall impose any impost or duty on imports or exports."

How far the States may protect the community from pauperism, disease,

crime, by police regulations, in reference to sales of liquor, is a question which can never arise upon a revenue law, exacting duties on imports or exports.

The States are prohibited from imposing imposts or duties in any form, and State regulations, to be exerted effectually for police purposes, must not wear the garb of a tax bill.

Nor do the inquiries of the Court, relative to nuisances in water courses and impositions upon navigation, apply to this case. For, although in those discussions the power of the United States is maintained, yet they stand upon inferior grounds to those held by the appellees before the Court.

The appellees refer the Court to the constitutional inhibition upon the States to impose duties on imports, and we prove that the property upon which this tax was levied, was prepared for market in New Orleans, in another State, and sold in that form by his agent. The property was an export from the State of production, and an import at the place of sale. We are answered that this clause does not apply to inter-State commerce; that imports are foreign imports, and this is proved by fragmentary citations from discussions on the boundaries between police and commercial power.

The controlling decisions upon this subject are those in which the Supreme Court of the United States have made decisions upon the power of the States to tax. These cases were decided by the Court, and with little or no dissent. They embrace a variety of cases, which fully include this.

The boundaries of the power of the States to levy taxes, were declared in the case of *McCulloch v. Maryland*, 4 W. 316.

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission." "It does not extend to those things which are withdrawn by the Constitution of the United States from its operation and control." "The means which are employed by Congress to carry into execution power conferred on that body by the people of the United States," are exempt. The stock issued by the United States for loans made to the United States; the stock of the United States Bank; the salaries of officers of the United States, are severally exempt. *Commissioners of Erie v. Doblin*, 16 Pet. 315. *New York v. Commissioner of Taxes*, 2 Black. R. 620.

The States cannot impose duties on imports in the form of a tax on licenses to importers. 12 Wheat. 410.

They cannot tax ships belonging to a citizen of another State, temporarily engaged in the navigation of its waters, but having no abiding place in the State. 17 Howard, 597.

They cannot impose a tax upon gold exported from California to New York. 24 Howard, R. 169.

In the first of these cases, *Brown v. Maryland*, the entire operation of the clause in the Constitution was considered by the Court. The Court had been called, in antecedent cases, to consider of the taxing power of the States, and whether in any case limited, and the extent of their powers over commercial agencies and instrumentalities, and now the question comes up whether the taxing power of the States respecting

commerce was at all prohibited, and how far the prohibition extended. The opinion of the Court was that it applied to preclude taxes on imports and exports arising from foreign or inter-State commerce. That is, that the prohibition was general.

It is difficult to find a more careful, candid and considerate judgment than the one delivered by the Supreme Court in that case.

Every word seems to have been weighed before it was uttered. Every depth was sounded before the Court dropped its anchor.

Now it is idle to attempt to shake the authority of this judgment by quoting from Judge A. or Judge B. The Court promulgated that opinion, and its authority is not to be impugned except by the Court.

But the Court never dreamed of shaking it. Whenever any case within its principle has come up, its authority has been recognized.

In the case of *Almy v. California*, 24 Howard, 169, Chief Justice Taney, speaking for the entire Court, said: "We think this case cannot be distinguished from that of *Brown v. Maryland*, reported in 12 Wheaton, 419. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution in question."

The material facts of the cases that identified them, was that a State had levied a tax—in the first case—upon foreign imports; in the last case, upon exports to another State.

But the prohibition to levy taxes upon imports from any place, or exports to any place, is absolute, and so the Court decided in *Brown v. Maryland*, and so the Court affirmed it to have been in *Almy v. California*.

The Attorney-General cannot reconcile that opinion, with some previous fragment of an opinion he has found of the late venerable Chief Justice in an earlier case.

The answer may possibly be found in the fact that in the case of *Almy*, Chief Justice Taney was the organ of the entire Court, and expressed their judgment, and his concurrence with it.

His personal opinion in another case, was quite a different thing from his opinion delivered in the name of the Court, and by its authority.

It may have been that the Chief Justice had become satisfied that there could be no improvement to the rule of *Brown v. Maryland*, and that stability ought to be given to it by the judgment of the entire Court.

But it is quite probable that a close scrutiny would show that there had been no incongruity. But if the Chief Justice had expressed some opinion inconsistent with that subsequently given in *Almy v. California*, does that alter the authority of the decision in that case? That opinion has all the weight that the concurring judgments of all the members of the Court can give to it. The opinion is clear, distinct and pertinent. The facts of the case are few and undisputed.

An invoice of gold was shipped from the port of San Francisco to the city of New York. The revenue law of California required a stamp to be placed on the bill of lading, showing the shipment. This was not done, because it was insisted that this was a tax on exports, and therefore prohibited by the Constitution of the United States.

The Court decided, that though this tax was not formally a tax on the

invoice of gold dust, it was so in intention and effect, and that a tax upon the gold dust imported to New York was a violation of the Constitution.

When we consider that the prohibitory clause of the Constitution extends as well to imports as to exports, and that the object of introducing that prohibition upon the power of State taxation was to protect inter-State commerce, it will at once appear that this authority is controlling in this case.

The facts established in the case before the Court show that the property held by the appellees was temporarily in New Orleans to find a market; that it had never become mingled with other property of the State; that the owners were non-residents, and were liable to taxes elsewhere.

The case meets all the conditions that are set forth in the case of *Brown v. Maryland*, to exclude the jurisdiction of the State of Louisiana, in the matter of taxation, unless it shall be determined that the power of the State over property imported from the States of the Union is unlimited.

But, in our judgment, the history of the Constitution, the contemporaneous judgments upon it, and the mischiefs the clause was intended to remove, alike show that the States have not such power.

TALIAFERRO, J. This action was commenced on the part of the State against the defendants, to compel them under an act of the Legislature of the State, approved April 4th, 1865, to pay over the sum of twelve hundred dollars, alleged to be due to the State, arising from the tax of one-fourth of one per cent. imposed by that act upon the gross amount of sales of defendants, as commission merchants, from 1st July to 31st December, 1865, and twenty per cent. on the amount of the tax as a penalty for the non-compliance on their part with the act aforesaid; the whole amount, tax and penalty, being twelve hundred dollars.

In their answer, the defendants state that between the 1st July and 31st of December, 1865, they sold in the city of New Orleans of "Western Produce" to the amount of four hundred thousand dollars, consisting of bacon, pork, flour, corn, rope, lard, and other articles of that kind; that these commodities were consigned to them by citizens of the United States, residing beyond the limits of the State of Louisiana, for sale, and that the same were sold by them for and on account of the non-resident owners, who were citizens of Missouri, Illinois, Indiana, Ohio, Kentucky, and other States on the Mississippi river, and its various tributaries; that these sales were made of the said produce in the form in which it was prepared by their constituents, beyond the limits of Louisiana for market, for a commission of two and a half per cent. upon the gross amount of the sales. They contend that the property thus introduced into the State of Louisiana from other States and thus sold, is exempt by the Constitution of the United States from import duty, or other tax for the benefit of the State of Louisiana. They further aver, that the tax aforesaid is unequal, as it discriminates in favor of a large class of persons who pursue the same business with themselves, and that it is for this reason, repugnant to the Constitution of the State of Louisiana, in relation to the imposition of taxes.

Judgment was rendered in the Court below in favor of the defendants, and the State appeals.

In the formation of the Constitution of the United States, it was foreseen that the inter-communication between the States might be a fruitful source of agitation and trouble. Under the Articles of Confederation this trouble was distinctly foreshadowed, as well as that likely to arise from leaving to the States the power to lay impost upon foreign importations. The last-named pretension was disposed of by the distinct enunciation contained in section 10 of the 1st Article, that "No State without the consent of the Congress shall lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress."

The provisions contained in this Article of the Constitution, it is contended in this case by the Attorney-General, refers exclusively to imports from foreign countries; and, in an argument of much learning and research, he maintains that legislation on the subject of inter-State commerce, is not exclusively entrusted by the Constitution to Congress.

From numerous authorities invoked by him he deduces the conclusion, that in the case before the Court "the tax on gross sales or receipts is simply a legitimate exercise of the taxing power, and in no manner a regulation of commerce; nor is it even an indirect interference with the regulation of commerce; and should it be considered a regulation of commerce, it is not thereby repugnant to the Federal Constitution."

The doctrine, that the States have a concurrent power with Congress "to regulate commerce between the States," would seem to involve the very difficulty which it was obviously the purpose of the framers of the Constitution to provide against. Looking to the objects aimed at, the inference seems clear that they intended to prohibit the exercise of this power by the States. The abuse to which such a power might lead may well be illustrated by the position and commercial advantages of the State of Louisiana. It controls the outlet to the ocean of the great river, which, with its vast tributaries, flows through the boundaries of so many wealthy and populous States. Near that outlet, and within the same State, is found the common mart at which the various products of the States of the Mississippi must all meet for sale, or for exportation to other States of the Union or to foreign countries. What if Louisiana should impose a tax upon cotton, coming from Arkansas to New Orleans to be shipped to Massachusetts, or upon tobacco from Kentucky and Missouri, destined for Europe? It is plain that this would be in derogation of the common right which belongs to the people of all the States of the Union, the right to the free use of the Mississippi river. It would be, in the one case the laying an export duty which is plainly forbidden, and in the other, the imposing a burden upon the commercial intercourse between the States, and to that extent a regulating the commerce between them. And would it not amount to the same thing if Louisiana should impose a tax upon the products of other States brought to New Orleans for sale, belonging to individuals of other States, and sold here as their property; or place the tax upon the proceeds of such property when



sold? It is shown, in the case in controversy, that the products sold by the defendants were prepared and put up by the owners and producers in the States from whence they were brought, and sold in New Orleans in the same form in which they came here, that they were sold for the owners, and that the defendants have no interest whatever in the proceeds beyond their commissions for making the sales. Until a change in the ownership, or in the condition of the merchandise has taken place, so that it becomes incorporated with, and forms part of the property of the State, it is not subject to State taxation. When sold, the money represents the thing sold; it belongs to a citizen of another State, and is equally exempt from the tax.

But, whatever opinions may have been at any time expressed, favoring the view that the power to regulate commerce among the States is not exclusively vested in Congress, we consider that the authorities are decidedly against that opinion. The question was considered by the Supreme Court of the United States, in the case of *Gibbons v. Ogden*, 9 Wheaton 1. It was there declared that the power of Congress "to regulate commerce with foreign nations and among the States" is complete in itself, and that it has no limitation other than are presented by the Constitution. In the same Court the subject underwent a full examination, in the case of *Brown v. The State of Maryland*, 12 Wheaton 410. This case arose upon a statute imposing a license tax upon all persons who should sell imported goods. It was held to be a tax upon all imports—an import duty, and was therefore unconstitutional. The Court said: "All must perceive that a tax upon an article imported for sale is a tax on the article itself. It is true the State may tax *occupations generally*, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician or the mechanic, must either charge more on the article on which he deals or the thing is taxed through his person. This, the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of an article, and be paid by the consumer or by the importer himself, in like manner as a direct duty on the article itself would be paid. This the State has not the right to do, because it is prohibited by the Constitution." In conclusion, the Court say: "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State." In what are called the *Passenger cases*, 7 Howard 410, the question was whether the States could levy a tax upon passengers coming in foreign vessels to the United States. Mr. Justice Wayne, in delivering his opinion, said: "Do not the constitutional powers of the United States act upon the territory as well as upon the sovereignty of the States to the extent of what was their sovereignty, before they yielded it to the United States. Can any one of the sovereign powers of the United States be carried out by legislation without acting upon the territory and sovereignty of the States? This being so, Congress may say and does say, whence a voyage may begin in the United States, and where it may end in the United States. Though in its transit it enters the territory of a State, the political jurisdiction of the State cannot interfere with it by taxation or otherwise until the voyage has ended; not until the persons

who have been brought as passengers have been landed or the goods which may have entered as merchandise, have passed from the hands of the importer, or have been made by himself a portion of the mass of the general property of the State."

To the same purport is the case of *Hays v. The Pacific Railroad Company*, 17 Howard 597. A tax was imposed by the State of California upon the steamships of a line of vessels of that class engaged in navigating the Pacific Ocean from St. Francisco to Panama. The Court held for the same reasons given in the *Passenger cases*, that the State had no jurisdiction.

The case of *Almy v. California*, 24 Howard 169, was that of a tax imposed by the State upon the gold or silver coin, or gold dust transported from any place within the State to any place without the State. The tax was laid in the form of a stamp duty on the bill of lading. The Court held that it was a tax on exports, and was unconstitutional. In this case the export was from California to New York. We regard it as important, because it affirms the case of *Brown v. The State of Maryland*. In *Almy v. California*, the Supreme Court remarked, that the decision in *Brown v. The State of Maryland*, has always been regarded and followed as the true construction of the clause in the Constitution now in question. It shows that the Court regarded the inter-State commerce as standing upon the same ground, as to the constitutional protection, as foreign commerce; and that the closing paragraph, which we have before cited from the opinion in the case of *Brown v. Maryland*, viz: "that the principles laid down in this case apply equally to importations from a sister State," announces the settled doctrine on the subject.

The conclusion we reach, after a general view of the question, and a careful examination of the authorities, renders it unnecessary for us to consider the other ground of defence, the illegality of the tax arising from its alleged inequality, and therefore in derogation of Article 124 of the Constitution of the State of Louisiana.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NATCHITOCHES.

AUGUST, 1867.

JUDGES OF THE COURT.\*

HON. WM. B. HYMAN, *Chief Justice.*  
HON. ZENON LABAUVE, }  
HON. J. H. ILSLEY,     } *Associate Justices.*  
HON. J. G. TALIAFERRO. }

\* Hon. R. K. Howell, absent.

No. 64.—SARAH WARE et al v. RUSSELL JONES, SR.

The heirs of the deceased become seized of the property of their ancestor at the moment of his decease. The surviving widow is seized of one-half of the community property, and the heirs of the other.

The title so vested continues in them, subject to be divested at any time by the creditors themselves, or by the administrator for them. The widow and heirs take the estate absolutely, subject to the debts and charges against it; and all that is meant by residuary rights is, that the property is thus encumbered.

Where the widow and heirs of a deceased party bring suit against a third party in possession for property belonging to them, the third possessor cannot require them to show affirmatively that the administration is closed before they can recover.

A third possessor cannot set up that there are creditors holding claims against the property in his possession to defeat the heirs; only the creditors, themselves, or the administrator for them, can make such defence.

**A** PPEAL from the District Court, Parish of Bossier, *Weems, J.*  
*Jones and Scott*, for plaintiffs and appellees. *Griffin & Snider*, and  
*L. B. Watkins*, for defendants and appellants.

**TALIAFERRO, J.** The widow and heirs of William Harkins, deceased, bring a petitory action in this case to recover three several tracts of land containing, in the aggregate, about four hundred acres.

The suit was instituted in the first instance against Russel Jones, Sr.,

who was alleged to be in possession, and who, it seems, died not long after the action was brought. It was renewed against his heirs, and Russel Jones, Jr., who became administrator of his father's estate, answered, denying any right to the property sued for in the plaintiffs, and averred that it was purchased by his ancestor from Andrew Lawson, by deed of conveyance, dated 29th of November, 1850. He alleges that since the purchase, valuable improvements have been made on the land, and that the sum of fifteen hundred dollars was paid to Lawson as the price of the land. He prays, in case of eviction, that he be allowed seven thousand dollars for the improvements, and that he recover from the succession of Lawson the amount paid for the land. The executor of Lawson was called in warranty, but we do not find that he answered. The plaintiffs had judgment in their favor, decreeing them to be the owners of the land, and awarding them rent for the use of the land at the rate of two hundred dollars per annum, from 1st January, 1852. The defendants had judgment over against the succession of Lawson for the amount claimed of the executor under the warranty. From this judgment the defendants have appealed.

We shall direct our attention in the first place to several bills of exceptions found in the record. Before answering to the merits the defendant excepted to the action, on the ground that it was instituted against a party not in possession, averring specially that Elkin Jones was possessor of the land and premises, and moved a dismissal of the case. The testimony of several witnesses was introduced on the question of possession, but their statements are contradictory. Russel Jones, Sr., and Elkin Jones, were both living together on the plantation, and the title obtained from Lawson was in Russel Jones, Sr. We think the exception was properly disregarded by the Court.

The defendants filed what they term a peremptory exception, the substance of which is that there were not proper parties before the Court; that one of the heirs of Harkins had died since the commencement of the suit, and that no revival had taken place in the name of his representative, and that another heir, at that time a minor, had attained the age of majority. They further excepted to the suit that it should have been brought in the character of one for partition. It appears from this bill of exceptions, that it was presented after the close of the evidence, and when the argument of the cause was about to commence. The exception being of the dilatory kind, we think the Court properly overruled it, on the ground that it came too late.

A third bill of exceptions was taken by the defendants to the admission of evidence to prove that Lawson (whose executor was called in warranty) declared in relation to the lands in controversy, that if the heirs of Harkins were to sue for them they would recover, as the perfect title was in them. The objections are, that the declaration was made, if at all, out of the presence of the parties, and is a mere loose hearsay statement. That so far as the defendants are concerned, the representative of Lawson is not a party to the suit. The evidence was admitted by the Court only to show the bad faith of Lawson, under whom defendants hold, and to prevent prescription. We think the ruling of the Court was proper.

2 N. S. 13. 12 R. 146.

The plaintiffs reserved a bill of exceptions to that part of the charge given by the Court to the jury, which instructed them that unless the heirs of Harkins show, affirmatively, that the estate of their ancestor has been settled and the administration closed, they cannot recover.

It appears that William Harkins died in the year 1840. In the month of October of that year, an inventory was taken of his estate. It further appears that W. C. Veeder became the administrator, and that in the month of April, 1845, he filed an account of his administration. This account was opposed, and much litigation followed. The estate, by the showing of the administrator was insolvent, and paid nothing to the ordinary creditors. From the judgment rendered by the District Court of Claiborne, adjusting the claims of the parties, the administrator appealed, and this Court, in October, 1847, remanded the case to the lower Court for further proceedings.

We find nothing in the record showing that any other proceedings were taken afterwards in relation to the estate. It is in proof that in the year 1849, the Court-house of the parish of Claiborne, together with the clerk's and recorder's offices were burned, and all the records destroyed. In consequence of this accident the parties in this suit are compelled to resort in a considerable degree, to secondary evidence in relation to facts which would, under other circumstances, have to be established by written proof.

There appears some confusion and irregularity took place in regard to the affairs of the estate, and the management of it appears to have reflected no credit upon the administrator. The land in dispute, it appears sufficiently clear, was placed upon the inventory of the estate, but we do not find that it was ever sold by any order of Court invoked by the administrator or creditors of the succession. Evidence was introduced, in the course of the trial, to show how this property was disposed of. This we shall presently notice. In the consideration of this exception, we have to determine whether, under the circumstances presented, the widow and heirs of Harkins are precluded from asserting a right to the land in dispute, on the ground that they have not shown that the administration of the estate has been closed.

At the decease of their ancestor his heirs became seized of his property. The land, being community property, one-half of it belongs to the widow, and the other to the heirs. The title so vested continues in the parties, subject to be divested at any time by the creditors themselves, or by the administrator acting for them. When it is said that the rights of heirs are merely residuary, nothing more is meant than they take only what remains of a succession after its charges are paid. They are not the less owners of the property they inherit, because it is followed by and subject to the charges against it. What then is to prevent them from asserting their rights to property as against persons not creditors of the ancestor or of the succession? If the creditors fail, or omit to claim property found in possession of third parties, and which belongs to the succession against which they have claims, shall the heirs of the succession be precluded from claiming it? In the present case, we find that the last proceedings legally taken, in regard to the affairs of Harkins' estate, was in the year 1847. Ten years afterwards, this suit is brought by



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his widow and heirs. Another ten years have since passed, and we yet find no creditor claiming to have rights against this property. Shall third parties in possession avail themselves of this long silence and inaction of the creditors, if there remains any, to deprive the owners of their rights to it? Shall they resist the claims of the plaintiffs by asserting that the administration of the estate is not yet closed? We do not see that there is an administrator to this estate; and, if there be one, we do not find him intervening in this controversy on behalf of creditors; without determining that creditors, if there be any, have but their rights against the property in question—whether in possession of the heirs or of third parties, we, nevertheless, conclude that under the state of facts that appear to us to exist, the plaintiffs should be permitted to assert their claims as against the defendants, and in that view of the case we think that the plaintiffs' exception to the charge of the Court to the jury should have been sustained.

On the merits, we find that the plaintiffs set up title under government patents issued to William Harkins. Against this title the adverse claimants set up one, that they endeavor to sustain by parol statements, which, in some respects, appear somewhat contradictory. The deputy sheriff, Alder, says in his testimony, that he acted in that capacity in the parish of Claiborne, about four years, commencing his duties in the spring of 1838; that he sold the land Harkins was then living on under a *feri facias*, issued in a case entitled *C. H. Veeder v. Wm. Harkins*; that Veeder bought the land, and that a deed was made to him; that the sale was, in the first instance, made on twelve months credit, and a twelve-months' bond taken; that the bond was not paid at maturity, and that the land was sold under the bond, and that J. R. Runnels bought it.

J. R. Runnels says, in his testimony, that "the said administrator (meaning Veeder) did sell the lands belonging to the estate of said Harkins, at least I positively know that he sold the plantation he lived on at the time of his death. C. H. Veeder sold to me the plantation at private sale. He, the said Veeder, sold me the tract of land for one thousand dollars cash down, and the balance on one and two years' time, the whole amounting to three thousand dollars. C. H. Veeder furnished me the money to pay the thousand dollars, and I gave him my notes for the balance of the purchase money. The first of these notes was transferred to Andrew Lawson. The second was handed to me by C. H. Veeder, in Alexandria, La., which was not paid by me, but was destroyed by myself. These notes were made payable to C. H. Veeder, as administrator of Wm. Harkins. Said lands were afterwards sold by Andrew Lawson to force his lien on the first note. He bought the lands, and afterwards sold them to Russel Jones, Sr. It was most perfectly understood between C. H. Veeder and myself, that I was to have the place on paying the first note of one thousand dollars, but, as I was not certain of my title, I did not pay, and the place was sold as above stated."

The land purporting to have been sold under *feri facias*, and purchased by Veeder, is identified as the same land placed upon the inventory of Harkins' estate. It is unexplained by the record before us, why Veeder, if he supposed he had acquired a title to these lands in Harkins' lifetime by virtue of the sheriff's sale spoken of, should accept the inventory

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upon which they were set down as property of his succession, and should sell them to Runnels, and take his notes payable to the estate. The private sale of the administrator to Runnels was a mere nullity, and it is clear that neither Runnels nor Lawson had any confidence in the title thus obtained. To make out title under sheriff's sale, it is necessary to show a judgment, execution and sheriff's deed. In the case before us, it is not shown that there was a judgment from which subsequent legal proceedings sprung. The title by the sheriff's sale is defective in this respect, and taking the acts of Veeder as a criterion, we cannot but conclude that he attached no validity to it himself. The title of the defendants derived from such a source cannot be successfully opposed to the clear, unambiguous title shown to have existed in the plaintiffs' ancestor, and of which it is not shown the plaintiffs have ever been divested.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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No. 113.—JAMES W. HOWARD *v.* JOSHUA E. KIRWIN.

Confederate treasury notes were issued in violation of law, and used for the purpose of overthrowing the Government of the United States.

Courts of Justice will not lend their aid to give effect to contracts, the consideration of which are illegal and reprobated by law.

**A**PPEAL from the District Court, Parish of DeSoto, *Weems, J. Elam and Wemple*, for plaintiff and appellant. *R. J. Bowman*, for defendant and appellee.

**LSLEY, J.** This case presents the question as to the right of the plaintiff to invoke the aid of this Court to enforce a contract, the consideration of which was one reprobated by law, to wit: notes issued as money by a confederation of States to destroy the Union and to destroy the government of the United States, of which the rebellious States, so confederated, were members.

By repeated decisions, we have refused to notice such cases, and as the one now submitted is, in this particular, one of the same class, it must be dismissed.

It is therefore ordered, adjudged and decreed that this suit be dismissed at the cost of the appellant.

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No. 112.—JAMES W. HOWARD *v.* WILLIAM MATHEWS.

**LSLEY, J.** The facts of this case, in regard to the consideration of the contract sued on, are identical with those in the case of *James W. Howard v. Joshua E. Kirwin*, and for the reasons for our judgment in that case just decided.

It is ordered, adjudged and decreed, that the suit be dismissed at the costs of the appellant.

Brady v. McWilliams.

## No. 63.—T. R. BRADY v. J. G. MCWILLIAMS, Administrator.

The testimony of one witness, unsupported by corroborating circumstances, is insufficient to prove a verbal contract where the amount exceeds five hundred dollars. C. C. 2257.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J.*  
*Jones & Harris*, for plaintiff and appellee. *J. W. Jones*, for defendant and appellant.

**HYMAN, C. J.** The plaintiff obtained judgment against the defendant on a contract exceeding \$500, which was not reduced to writing, on the evidence of one witness only of the contract, without any proof of circumstances sustaining his evidence; and the defendant has appealed from the judgment.

The evidence is insufficient to justify the judgment, as such contracts must be proved by at least one credible witness, and other corroborating circumstances. See Civil Code, Art. 2257.

Let the judgment of the District Court be reversed, and let the case be remanded to the District Court to be proceeded with according to law; the plaintiff to pay cost of appeal.

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No. 61.—WILLIAM SPROWL et al. v. ELLA D. STEWART AND ROBERT S. DUNCAN.

A judgment based on a written agreement of the parties, must conform to the terms of the agreement. Where the parties to a suit have consented in writing to a judgment, and the judgment of the Court does not conform to the consent, either party has the right to appeal to have the error corrected.

**A** PPEAL from the District Court, Parish of Natchitoches, *Lewis, J.*  
*Pierson & Levy*, for plaintiffs and appellants. *C. Chaplin & Son*, for defendants and appellees.

**LABAUVE, J.** The judgment appealed from was rendered upon consent and admissions of the parties, but the plaintiffs and appellants complain that there is a manifest error in the judgment, which does not follow the agreement and admissions. On examining the judgment and the agreement, we have satisfied ourselves that the judgment was not rendered as authorized by the agreement, and that the plaintiffs and appellants have the right to appeal in order to correct the error; the judgment is erroneous, as it does not conform with the agreement, and must be amended.

It is therefore ordered and decreed, that the judgment of the District Court be annulled, as follows: That the defendants, in addition to the sum decreed below, pay *in solido* the further sum of three thousand six hundred and ninety-six dollars and eighty-seven cents, with interest, at eight per cent. per annum, from the 1st of January, 1866, till paid; that the mortgage and privilege of the vendor be recognized, and made executory on the property described in the petition to satisfy this judgment as amended and affirmed. It is further ordered and decreed, that the judgment as amended be affirmed, and that the appellants pay cost of appeal as by their consent.

## No. 86.—JOHN V. HAYS v. LEONARD G. COMPTON.

Where the petition alleges that the defendant is executor, and he is cited in that capacity, a promissory note signed by him as executor, is admissible in evidence under the general issue.

**A** PPEAL from the District Court, Parish of Rapides, *Lewis, J. Lewis & Hunter*, for plaintiff and appellee. *T. C. Manning*, for defendant and appellant.

**LABAUVE, J.** The petition alleges that Leonard G. Compton, executor of the estates of J. and A. B. Compton, deceased, is justly indebted to the plaintiff in the sum of \$5,500, with interest, as will appear by reference to the note of the said Leonard G. Compton hereto annexed, and made part of the petition. The note purports to be given for services rendered as manager.

The petition concludes by praying that the aforesaid Leonard G. Compton be cited to appear and condemned to pay said sum with interest.

The defendant answered as follows:

"The defendant, Leonard G. Compton, denies all, and singular the allegations in plaintiff's petition contained, and specially denies that he is indebted to petitioner in the sum set forth in his petition, or in any other sum, and prays that the writ be hence dismissed, with costs."

Judgment was rendered in favor of plaintiff, and the defendant appealed.

On the trial of the case, the plaintiff introduced in evidence, a note signed by L. G. Compton, executor of J. & A. B. Compton, to the introduction of which defendant objected, on the ground that he is not sued herein as executor of said estates, nor is it alleged that he is indebted to the plaintiff in his representative capacity, etc. The objections were overruled, and the defendant took a bill of exceptions.

We are of opinion the Court did not err. The defendant, by pleading the general issue, admitted that he was executor, as charged in the petition. The note made a part of the petition, and he was cited as executor. There was no necessity of repeating his capacity in any paragraph of the petition.

We are satisfied that the Court decided correctly, in giving judgment against the defendant in his representative capacity.

Judgment affirmed, with costs.

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No. 67.—O. W. BEALL v. SAMUEL VAN BIBBER.

Where one renders services beneficial to another at his request, an implied contract is raised for remuneration.

The law does not allow one person to enrich himself at the expense of another.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J. Jones & Harris*, for plaintiff. *Looney & Wells*, for defendant.

**HYMAN, C. J.** Plaintiff sued defendant for the value of his services as manager of defendant's hands, from 1st October, 1863, to 1st August, 1865, claiming that his services were worth \$750.

Beall v. Van Bibber.

Defendant, in his answer, denied the allegations of plaintiff's petition, and claimed judgment in reconvention, and compensation against plaintiff for board, lodging, washing, clothing and horse hire.

The District Judge rendered judgment, condemning defendant to pay plaintiff \$250, with interest and cost of suit, and rejecting defendant's plea in reconvention and compensation.

Defendant has appealed from the judgment.

It is fully proved that defendant requested plaintiff to take charge of and manage his hands, and that he did, under the request, manage them from October, 1863, to August, 1865, raising during the time crops for defendant.

It is also proved that such services as plaintiff rendered for defendant, were worth from \$250 to \$300 a year.

When one renders services beneficial to another, at his request, an implied contract is raised for remuneration. 13 La. Rep. 136.

The law does not allow one to enrich himself at another's expense.

Defendant failed to make satisfactory proof of his alleged rights in his answer.

The plaintiff has not filed his answer to the appeal, nor asked that the judgment be amended.

Let the judgment of the District Court be affirmed, and let the defendant pay the cost of appeal.

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NO. 59.—THE STATE OF LOUISIANA *v.* RHODA BRYAN.

A bill of indictment for larceny will not lie, unless brought within one year after the offence shall have been made known to the officer having the power to direct the investigation. The indictment must negative prescription apparent on its face, by alleging either, that the crime was not discovered within the year, or that the prisoner absconded or fled from justice.

**A**PPEAL from the District Court, Parish of Natchitoches, *Lewis, J.*  
*David Pierson*, District Attorney, for the State. *E. T. Lewis*, for defendant and appellee.

**LSLEY, J.** This case comes up on a general demurrer, sustained by the lower Court; and the point is that the indictment does not negative prescription, which on its face, has accrued.

"It is not charged in the indictment that the prisoner absconded or fled from justice; nor, is it alleged that the crime was not discovered and denounced until within a year of the finding of the grand jury; until one or the other of these facts is alleged and proved to the satisfaction of a petit jury, the prisoner, in the words of the statute, cannot be punished for larceny. Every thing essential to the punishment of the prisoner must be found by a jury of her country, and must appear of record; otherwise, the law does not authorize a Court to pass a sentence upon her." See 7 A. 256; and 17 An. 69.

This is matter apparent on the face of the record, and it was put at issue by the general demurrer.

The Court below did not err in sustaining the demurrer, and quashing the indictment, and the judgment of the Court is therefore affirmed.



## No. 58.—STATE OF LOUISIANA v. THOMAS TEXADA.

The act of the legislature approved March 1858, relative to the drawing of grand jurors, requires the foreman to be selected from the whole *venire*, and the remainder to be placed on slips of paper in a box, from which the sheriff draws fifteen names, which, with the foreman already selected, forms the grand jury—a grand jury drawn from the list of names on file is irregular. Where the offence charged in the indictment was committed on the first day of the term, it is impossible for the accused to file his objections to the mode of drawing the jury on the first day of the term: in such cases the objections may be made afterwards.

**A** PPEAL from the District Court, Parish of Rapides, *Lewis, J.*  
*David Pierson*, for the State. *Ryan & White*, and *E. T. Lewis*, for defendants.

**TALIAFERRO, J.** This case comes up on demurrer to the indictment of the defendant, for shooting with the intent to commit murder. Various points of objection are stated to the legality of the indictment. We shall consider the only one thought to have any force, viz: "That the said indictment was not found by a grand jury qualified to inquire in the premises."

The indictment was found at the May term, 1866, and the demurrer filed 17th May, 1867. The objections were sustained and the indictment quashed. From this judgment of the Court below, the State has appealed.

The indictment is held to be null and void, on the ground that the grand jury which presented the bill was organized and empaneled by calling the list of the regular panel summoned for that term, and taking the fifteen who first answered to their names, after selecting a foreman from the whole panel.

This, it is admitted on the part of the State, is irregular, but it is contended that it is an informality which cannot be taken advantage of after the first day of the term, at which the jury was empaneled. Revised Statutes, page 296, section 3.

It appears that the offence with which the defendant is charged, was committed on the first day of the term at which he was indicted, and about four or five o'clock in the afternoon of that day. Under this state of facts a compliance with the requirements of the law would seem to have been impossible, and the law does not require the performance of impossible things. It is clear that the jury was not organized as it should have been under the provisions of the act of 1858. Acts of 1858, p. It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed.

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 No. 68 — WM. C. TOMPKINS & Co. v. A. S. MOORE et al.

This case presents only questions of fact.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J.*  
*Kilpatrick, Henderson, Lacy and Taylor*, for appellants. *H. G. Hall*, for appellees.

**TALIAFERRO, J.** The plaintiffs allege that in the year 1865, at Shelbyville, in Texas, the defendant Moore, by falsely and fraudulently

representing himself to be an agent of the United States Government, took forcible possession of twelve bales of the property of plaintiffs in possession of their agent, one Hanks, and, by the aid of the other defendants, caused the cotton so taken to be carried to the Parish of Caddo, in this State, where defendants sold it and converted the proceeds to their own use. They claim the cotton or its value, estimated by them at three thousand dollars; five hundred dollars damages in trouble and expense, and one thousand dollars as vindictive damages for the wrongful acts of the defendants. They pray judgment accordingly. The defendants severed in their answers. Moore admits that as government agent he seized some cotton in the hands of Hanks, but almost immediately discovered his error, and returned it to him. The defendant, Jasper McMillen, says he purchased a number of bales of cotton, (eleven bales more or less to the best of his recollection,) from Hanks, for which he paid him, in good faith. The other defendant, Marion McMillen, put in a general denial.

The plaintiffs had judgment in their favor for \$2,185, with 5 per cent. interest from 2d day of December, 1865. From this judgment the defendants have appealed.

We find a bill of exception taken to the admission of certain testimony, but as it is not important in the decision of the case to examine it, we pass it over.

There is great discrepancy in the evidence adduced. The testimony on the part of the defence, we think sufficiently makes good the allegation in Moore's answer, that he released the cotton after having seized it. One witness on the part of the plaintiffs, says that Hanks demanded the cotton after it was seized, but that his demand was rejected. Two witnesses swear that it was released as soon as it was discovered that it was not government cotton. Two witnesses testify to the removal of cotton, and one of them, that if it were returned he was not aware of it.

Two witnesses swear that Jasper McMillen purchased the cotton from Hanks, and a third, that Hanks told him he had sold the cotton to McMillan. One of these witnesses says that Hanks was paid for the cotton in gold at \$10 per bale.

It is stated by one or more of the witnesses that if there were any thing said about a sale, they heard nothing of it. This is insufficient to rebut the positive evidence that there was a sale. It is shown that there was much excitement at the time in Shelbyville, and a strong disposition manifested by the citizens of the place to forcibly resist the removal of the cotton, as it was private property. This fact would appear to add some weight to the statement of witnesses, that the cotton was purchased. One of the plaintiff's witnesses says "he does not think Moore professed to be after any private cotton, but only after government cotton." Upon a scrutiny of the whole of the evidence, we incline to think the preponderance is in favor of the defendants, and come to a different conclusion from that of the Court below.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed, and that judgment be rendered in favor of defendants, the plaintiffs and appellees paying costs in both Courts.

## No. 49. — JOHN C. BROWN v. WILLIAM CAVES.

Written evidence of a contract of sale is admissible without an allegation that the contract is reduced to writing.

The law does not require parties litigant to allege that their evidence is in writing.

The Supreme Court will not look beyond the transcript of appeal to ascertain facts not therein transcribed; nor will it presume that the District Court permitted a wrong to be perpetrated on the government.

**A** PPEAL from the District Court, Parish of Winn, *Lewis, J.*  
*Daniel Kelly*, for plaintiff. *David Pierson*, for defendant.

**HYMAN. C. J.** The defendant is appellant from a judgment condemning him to deliver to the plaintiff three bales of cotton, which were sold by him to the plaintiff.

The defendant relies on several grounds for the reversal of the judgment.

The first is that written evidence of the contract of the sale of the cotton was improperly admitted, as there was no allegation in plaintiff's petition that he had written evidence of the sale.

There is no provision of law that requires parties litigant to allege that their evidence is in writing before they adduce such evidence.

The second is, that as his receipt for the payment of the cotton sold to the plaintiff, states that payment was made in State money, he contends that the price by the contract of sale was agreed to be paid in State money, and that State money, being the consideration of the sale, was an unlawful consideration.

This is mere conjecture. The receipt does not state that State money was the kind of money the defendant agreed to take when making the contract of sale, nor does the expression State money give a definite idea of the money that was paid. It does not show that such money was unlawful money.

The third is, that the receipt was improperly received in evidence as on its face it had a suspicious appearance.

The copy of the receipt is in the transcript of appeal and there is nothing suspicious in the appearance of the copy. There was no evidence taken of the appearance of the receipt, to show that it was suspicious, and we are not permitted to look beyond the transcript of appeal to ascertain facts that are not transcribed therein.

The fourth and last ground relied on is, that the receipt was offered in evidence without first having been stamped as required by the revenue laws of the United States.

The transcript does not show that it was received without a stamp, and we cannot presume that the District Judge permitted a wrong to be perpetrated on the government. See *R. R. Roberts v. Sylvester Murray*, 18th A. R. 573.

Let the judgment of the District Judge be affirmed, defendant to pay cost of appeal.

Rehearing refused.

## No. 29.—W. B. STEWART v. J. R. BOSLEY et al.

A written obligation for the payment of money for services rendered or to be rendered in the so-called Confederate army as a substitute, is illegal on its face, absolutely null and void, and cannot be judicially enforced.

**A** PPEAL from the District Court, Parish of Natchitoches, *Lewis, J.*  
*J. M. B. Tucker*, for plaintiff and appellee. *J. M. Thomason*, and  
*J. H. Cunningham*, for defendant and appellant.

*Brief of J. M. Thomason and J. H. Cunningham, for defendant and appellant.*  
This action is founded on two written instruments made by defendants, payable to H. J. Patterson or bearer, dated February 21st, 1863, and one payable 23d February, 1864, the other, 23d February, 1865, for \$1,750 each.

The case was tried as to Bosley only. The instrument purports to have been given in consideration of services to be rendered by the payee, as a substitute for Bosley in the Confederate army, in the war then existing between the Confederate States and the United States.

The answer of Bosley sets up the illegality of the consideration; alleges that the pretended contract was made in violation of the Constitution and laws of the United States, and against the public policy of the General Government, and avers that it was immoral, *contra bonos mores*, null and void.

The judgment of the Court below was in favor of plaintiff. And after ineffectual efforts to obtain a new trial, defendant has appealed.

We think the Judge *a quo* erred; and, as he has favored us with a written opinion in the case, we are enabled to examine the peculiar process of reasoning leading to the conclusions enunciated therein.

At the very threshold of the argument the Court below became involved in the complicated questions as to the rights and powers of the States, as contradistinguished from those of the General Government, and as to the vexed issues as between State and National Sovereignty. We think his premises were bad, his reasoning unsound, and his conclusions erroneous. Years ago, when these issues had powerful advocates on either side, we would not have been so much astonished by such conclusions. But now, at this late and sad period of our history, after the arguments have all been exhausted without effect, and the issue transferred from the forum to the field, for trial under the fearful arbitrament of the sword, such views may be said to be, at least, unfortunate. They are not supported in principle by any writer on constitutional law. They are in direct opposition to the high authority of Story, Kent, Greenleaf, Wharton, and all American law writers. All our Courts have always held directly the opposite doctrine.

If the reasoning of the Judge below be sound, and his conclusions correct, then is the whole system of our former jurisprudence reversed; and the immense revolution through which we have just passed, while it has ostensibly failed, has been eminently successful in law. And while the Government is reestablished, and the States reunited in name, there is a most fearfully fatal antagonism still existing between the laws and

policy of the States and those of the United States. For, if it be now held that the States are sovereign, and may disregard, violate and annul the Constitution and laws of the United States, the war has been fought in vain, the revolution has ceased, but is not ended. This was the sole issue of the late fearful struggle. The tribunal was one of dernier resort. There is no appeal.

The Gulf States, under the leadership of men holding the same views with the Judge *a quo*, and asserting the same doctrines enunciated in the judgment below, boldly made the issue, and by all the energies of the most devoted partizanship endeavored to enforce their views. They failed; they abandoned the contest, and gave up the issue. They and we, all have acknowledged that the Constitution, laws and treaties of the United States are the paramount and supreme laws of the land, binding alike on the States and the people.

The error of the Judge *a quo* seems to exist in misconceived ideas of the nature of our Federal Government. Ancient and modern history are both replete, with instruction on such issues. Numberless attempts at entering into solemn compacts and permanent conventions without surrendering the individual sovereignty of the States had been made, and they had all failed. The American colonies were not without large experience on such questions. Such efforts on their part also proved abortive. The union for revolutionary purposes, with the articles of confederation for a closer union, likewise failed. They were too weak to support confederation. Bound *in foro conscientie* only, the States often withheld their sanction to measures of the most vital importance. The General Government had no power to coerce. The neglected and powerless Union was fast dying of its own inherent defects and weakness.

Warned by past experience, and dreading the prospects of the future, the great patriots and statesmen of that age pressed on the public mind the necessity of a convention for forming a stronger government. Their appeals were effective. The convention met. The Constitution of the United States is the result of their wise deliberations.

The sovereignty of the States was the vexed question before that convention. The delegates were generally extremely jealous of State rights. They yielded nothing but was shown conclusively to be absolutely essential to the national existence. Two sovereigns could not exist together; nor could the lesser rule the greater. The States had to surrender a portion of their sovereignty, or let the General Government fail. They chose the former. After years of the most learned and critical discussion, the Constitution was adopted by all the States, and its superior wisdom has been the eloquent theme of every orator. It was declared to be the *supreme law of the land*.

The object of that convention was to settle in the most solemn and authentic manner, then and for all time to come, the fearful questions now again reopened in the opinion of the Court below in this case. They had been as canker worms preying upon and consuming the vitals of all former confederations. It had been fully demonstrated in reason, experience and practice that no effective and permanent combinations could be entered into between States where each retained to itself the exercise of sovereign powers. The assertion of such powers, by the in-



dividuals, necessarily, in the very nature of things, ends the union, or leads to war for its maintenance. Such was the case in our late terrible struggle. Such must ever be the case under like circumstances.

A State or nation is a body politic, or society of men united to promote their mutual interests by their joint means. From the nature of the design there must be some one to determine, direct and command what is to be done by each in furtherance of the common object. This public authority is the sovereign power. *Vat.*, 1, 8. *K.*, 201, 220.

The Constitution of a State or nation is the paramount law of the land; the basis of public liberty and tranquility and of individual rights. *Vat.* 9 and 10.

All disputes arising respecting the Constitution, the public administration, or the rights of the members composing it, must be referred to the national authority. *Vat.*, 12. *Story on Const.*, 128, 166. *Const.*, art. 3.

The Government of the United States is partly national, partly federal; national, just in so far as it operates on individuals, federal in its relations to, and modes of operation on, the States. But whether national or federal, it is supreme to the full extent of all the powers expressly granted in the Constitution, and as to those necessarily implied in a grant.

The Constitution gives to the General Government, sole power to declare war and make peace, to enter into alliances and form treaties, to regulate commerce and coin money, and to manage all the external affairs of the country. These are the highest and most important attributes of sovereignty, and the party possessing them is essentially sovereign. And, as was necessarily intended, once granted by the States, they became irrevocable, permanent and binding to their full extent, scope and meaning.

The States and the people thereof retained all such powers only as were not expressly granted to the General Government, or necessarily implied in a grant, or prohibited to the States. As to these powers, the States are wholly without authority. Beyond these, and as to everything else, they are unlimited in their functions and responsible only to themselves and the public opinion of the world.

Hence, it follows that secession was not a right reserved by the States, or by the people thereof. Had it been retained, the labors of that august convention that formed the Constitution would have been in vain, and the delegates would have stultified themselves. For, as we have before shown, the objects of that convention were to take these sovereign powers or rights from the States and lodge them in the General Government; they having been found to be essential to its existence.

Yet, in the very face of these plain and unmistakable grants, by the States to the Federal Government, the Judge below argues that the States are still essentially sovereign, and have absolute control of their own citizens. If so, may they not grant them immunity against penalties for the violation of Federal law? Authorize them to refuse to pay Federal taxes, or serve on Federal juries, or bear Federal arms?

If, as argued by the Court below, the first and highest allegiance of the citizen is due to his State, then he must obey State laws, though they conflict with the higher, the paramount and supreme laws of the land,

Thus would a law of a State Legislature, or an ordinance of a State Convention, annul and set at defiance the Constitution of the United States. But such is not the case. The premises are wrong, the reasoning unsound, and the conclusion preposterous in the extreme. The Federal laws are supreme and must be observed by all, however much they may conflict with State legislation.

It follows, then, that any act done, or contract made, in violation of the higher laws of the country, must be held and declared to be without effect when made the basis of a civil claim or suit. The Court below accords to a party violating the Federal Constitution and laws civil rights founded on and growing out of the very act of violation. He argues, in effect, that since a State is an incorporeal existence, having no one to sit in judgment, or execute sentence, upon her, therefore, she may lawfully do whatever factious majorities, influenced by prejudice or passion, may think proper, without regard to the Constitution and laws of the United States; and that such State action is full protection to all her citizens against the demand, civil and criminal, of that Government.

It will be well for us all to remember that the General Government is not exclusively Federal. It is not to be confined in its operations only to the States. It may pass by these incorporeal existences and reach the corporeal individuals composing them. Upon these it may pass judgment and execute sentence. And when thus arrested for violations of Federal laws the State rights lawyer would plead, but in vain, State laws and ordinances in justification of such offences.

Nor can a state of war, be it insurrection, rebellion, revolution or civil war, alter the case. Attempted revolutions, engaged in by large bodies of people, may entitle them to certain purely belligerent rights. And this arises solely from humane considerations. If the attempt fail in its purposes, the participators are not even exempt from punishment, much less entitled to civil rights growing out of acts of war. Revolutions are always highly criminal, unless undertaken for the highest and most sufficient causes. They are too often the result of prejudice and passion excited to serve the ambitious designs of unprincipled demagogues and ambitious aspirants.

But plaintiff endeavors to justify and legalize the transaction out of which his claim grew, on the ground that a great civil war was pending, which annulled all preëxisting laws and constitutions, and to have his claim enforced by virtue of the belligerent enactments under which it was made. It would be unsafe to admit that a minority of the States and people in interest could inaugurate civil war. Our Republican ideas revolt at seeing minorities shaping the destinies of and ruling the majorities. Minorities of those in interest have no right to inaugurate revolution. The precedent is dangerous in principle and ruinous in practice. Not one in a thousand of them would take place, if factious minorities were not allowed to rule. Before the late fearful struggle the united voice of the South would have been heard; her united action would have been respected. And had she been forced to go to war, her united arms would have been successful, because of the majesty of right and truth. Then we would have had an example of civil war. But against the known wishes of the majority, South Carolina blindly led off, and others reck-

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lessly followed. The majority became involved against their consent and remonstrances.

But, if it had been a civil war, it would not alter the case. The same Constitution and laws are still supreme. They have not been overthrown.

That Constitution, Article 3, section 3, says: "Treason against the United States shall consist in levying war against them, adhering to their enemies, giving them aid and comfort."

The Confederate forces were the enemies of the United States; they were engaged in active, persistent, fearful war with them. The payee of the instrument sued on joined the enemies of the United States to fight their battles, to give them aid, and now plaintiff, who represents him, wants pay for the chivalrous act of undertaking to aid in the overthrow of the Government of the country in which he lives, from whose laws he receives protection, and to whose Courts he appeals for relief. Such a contract is reprobated by law, and cannot be enforced.

Chief Justice Marshall said: "It is perfectly well settled that no action can be maintained on a contract wicked in itself or prohibited by law." 11 War. 258.

The contract sued on is not only in contravention of law, but the acts forming the consideration of it, are forbidden and denounced as the highest crime known to the law. It is reprobated by law, because it is against the public policy of the Government. Neither is it considered in any more favorable light by the laws of our own State. Article 19, C. P. says: "Obligations contrary to justice, good faith, or good morals, such as those by which a reward is promised to commit a crime, give no right of action to either party." The example of the rule given is precisely in point. For plaintiff seeks a reward for the commission of the highest crime known to our laws.

Article 1772, C. C., says: "Every contract must have a lawful purpose." See also *Schmidt v. Baker*.

Article 12, C. C., says: "Whatever is done in violation of a prohibitory law is void."

Article 1886: "That is considered morally impossible, which is forbidden by law. All contracts having such objects are void." See also 1887, 1889, 2026.

The laws mentioned and referred to in these articles are: first, the Constitution, laws and treaties of the United States; secondly, the Constitution and laws of this State. The acts which formed the cause of the contract sued on are in palpable violation of the Constitution and laws of the General Government and of the State, and all those laws are now in full force.

We think the judgment is erroneous, and should be set aside and reversed, and judgment be rendered in favor of defendant, with costs in both courts, and we ask that it may be so ordered.

TALIAFERRO, J. During the late rebellion, one Patterson hired himself to the defendant, Bosley, to take his place as a soldier in the army of the so-called Confederate Government. The price stipulated was thirty-five hundred dollars, to be paid in two annual installments of half that sum

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each, for which two several promissory notes were given, with a surety on each. The notes were drawn payable to H. J. Patterson or bearer. The plaintiff became the holder, and brought this suit against the makers. The defence is, illegality of consideration, having been given in aid of the rebellion against the Government of the United States.

The plaintiff obtained judgment in his favor against Bosley, and the latter has appealed.

The notes express upon their face the purpose for which they were executed, and their illegality is patent. The obligation sought to be enforced is utterly null and void.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; it is further ordered that judgment be rendered in favor of the defendant, releasing him from the illegal contract entered into, the plaintiff and appellee paying costs in both courts.

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No. 48.—GODFREY MARTIN, Administrator, v. WILLIAM A. KELLY et al.

This case presents only questions of fact.

**A**PPEAL from the District Court, Parish of Bossier, *Jones, J.*  
*Fort & Brother* for plaintiffs. *L. B. Watkins*, for defendant.

**TALIAFERRO, J.** This is an action brought by the plaintiff, in his capacity of administrator, to compel payment by the defendants of two promissory notes, each for the sum of \$566 66, with interest, executed by them for the payment of the price of a negro woman, a slave belonging at the time of sale, in 1859, to the succession of A. Martin, deceased. The defence is, that at the time of the sale, and for more than one year previous, the woman was afflicted with an incurable disease of which she died not long after the sale. That the purchaser, Kelly, was ignorant of the existence of the malady at the time he purchased; that he incurred expense in procuring medical attention for the woman, from which she derived no benefit. The defendants prayed judgment releasing them from their obligation, and for judgment over against the administrator for the expense incurred, etc. There were three trials of the case in the Court below, and each trial before a jury. On one of these trials, the jury disagreed; in the other two, verdicts were rendered for the defendants who, obtaining judgment of release, the plaintiff appealed. The evidence shows that for several years previous to the sale, the slave was unhealthy. One witness testified that she was afflicted two or three years before the sale. That she was unable to labor regularly, and was frequently laid up on account of sickness. That she bore no children, and that he inferred from that fact that her unhealthiness arose. He stated that the woman had been in the possession of the plaintiff during the year previous to the sale. Several witnesses, and among them a physician, testified that the woman was greatly afflicted by, and suffered much from, derangement of the menses. That these afflictions were at monthly intervals. It was shown that the plaintiff said, about two weeks before the sale, in answer to an inquiry on the subject, that the slave was unsound.

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After the sale it appears that the defendant refused to execute notes in conformity with the terms of sale, until he received legal advice that a warranty was implied, as no declaration was made that the slave had defects of any kind. On the part of the plaintiff, an effort was made to show that the woman died from the effects of poison, and not of the sickness alleged by the defendants. In this effort, we think the plaintiff clearly failed. The physician who was called in during the last illness, testified that the woman died of convulsions, the cause of which he was unable to determine. He made a *post-mortem* examination, but had not the tests necessary to detect the presence of poison. When he first saw the patient at the time of her last illness, he thought the symptoms indicated spasmodic cholera. He was not positive she died of poison; had his doubts. He did not examine the coats of the stomach to ascertain whether they were affected. He found the liver diseased. After a careful examination of all the evidence, we come to the conclusion that the judgment of the lower Court was correctly rendered. It seems that there is no doubt that the slave had been continuously afflicted, at intervals of from three to four weeks, for two or three years previous to the sale, with a serious infirmity incident to females, and of which she finally died a short time after she was purchased by one of the defendants. There seems no reasonable doubt that the disease with which she was afflicted was incurable.

It is therefore ordered, adjudged and decreed that the judgment of the District Court, be affirmed with costs in both Courts.

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No. 41.—J. MARKS & CO. v. A. WINTER.

The contents of a written instrument cannot be proved by parol evidence, without first showing the existence and loss of the written document.

The best evidence in the reach of the parties should be produced.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J.*

*T. T. & A. D. Land*, for plaintiffs. *Wright & Duncan*, for defendants.

HYMAN, C. J. Plaintiffs brought suit against defendant on three promissory notes made by him, payable to their order.

Judgment was rendered in favor of the plaintiffs for the amount of the notes, with interest and cost, and defendant has appealed.

On the trial of the case in the lower Court, the defendant attempted to prove by parol the contents of a written agreement, which the Judge refused to admit, because it was not the best evidence, and defendant contends that there was error in the refusal of the Judge to receive such evidence.

The best evidence should be produced that is within the power of the parties to procure, and it is not pretended that the defendant could not have procured the written agreement.

The plaintiffs have fully proved their claims.

Let the judgment be affirmed, and let the defendant pay the cost of appeal.



No. 100.—JESSEE A. BYNUM *v.* HAMILTON AND J. E. TYSON.

Where the transcript of appeal does not show that a final judgment has been rendered in the lower Court, the appeal will be dismissed.

**A** PPEAL from the District Court, Parish of Rapides, *Lewis, J. J. Orsborn*, for plaintiff. *H. S. Losee*, for defendants.

**TALIAFERRO, J.** The plaintiff brings suit against the defendants on a contract for rent of land. A trial seems to have taken place in the Court below, but we nowhere find in the record that a final judgment was rendered, from which an appeal could be taken. We find the following extract from the minutes:

“ALEXANDRIA, May 8th, 1867.”

“Judgment for defendants. Appeal granted. Bond, \$100 for devolutive, according to law, for suspensive.”

We think the appeal premature, and that it must be dismissed.

It is therefore ordered that the appeal taken in this case be dismissed, the plaintiff and appellant paying costs of the appeal.

No. 28.—TIMOTHY LACOSTE *v.* JOHN R. WEST et al.

The builder has a privilege on the building which he may have constructed, but if the amount is over five hundred dollars, the agreement must be in writing, and registered, to preserve the privilege. C. C. 2746.

Where property sold under a mortgage brings more than the amount of the mortgage, the builder having a privilege next in rank to the mortgage, is entitled to the overplus.

**A** PPEAL from the District Court, Parish of Natchitoches, *Chaplin, J. J. B. Tucker*, for plaintiff. *J. M. Thomason* and *J. H. Cunningham*, for defendants.

**LABAUVE, J.** On the 8th October, 1860, E. F. Fitzgerald executed his note for \$500, in favor of J. R. West, and to secure the payment thereof, contracted a special mortgage in favor of said payee of said note, upon a certain lot of ground described in the record. On the 6th of October, 1865, the said John R. West obtained an order of seizure and sale against said lot. The plaintiff, alleging that he had a privilege of the builder on a house erected upon said lot by one Meloin, for \$516 85, with eight per cent. per annum interest, from the 4th of August, 1861, obtained an injunction upon West and the sheriff, ordering the sheriff to retain in his hands, subject to the further order of the Court, the proceeds of sale of the building.

This alleged privilege of the plaintiff and opponent is based upon the following note:

“NATCHITOCHES, February 4th, 1861.

“Six months after date I promise to pay to the order of W. C. Meloin, for building house, the sum of five hundred and sixteen dollars and eighty-five cents, with eight per cent. interest per annum from maturity; value received.

(Signed)

E. F. FITZGERALD.”

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The plaintiff, having become the holder and owner of said note, on the 11th June, 1862, presented to the District Judge, at Chambers a petition praying for a judgment against the maker of said note, with the privilege of builder, and that said house be seized and sold to pay the judgment. The defendant in that suit accepted service of the petition, and confessed judgment as prayed for, and both parties agreed that the Judge should try the case, and render judgment in Chambers; the judgment was accordingly rendered on the 11th June, 1862, decreeing the then defendant to pay said sum, and allowing the privilege on the house.

We consider that there is but one question submitted to our decision, and it is one purely of law; it is whether the plaintiff has a privilege preferable to the mortgage of J. R. West. The undertaker has a privilege on the building which he may have constructed. C. C. Art. 2743. But if the amount be above \$500, the agreement must be in writing, and registered, to preserve the privilege. C. C. Art. 2746. 4 A. 121. 5 A. 333.

In this case there was no agreement in writing registered. The judgment rendered in favor of T. Lacoste, and allowing and recognizing his privilege, is *res inter alios acta*, and not binding on West. 12 An. 521. We deem it unnecessary to pass on any other question; the alleged privilege of the plaintiff cannot prevail.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled and avoided, and that the provisional injunction be dissolved and the suit dismissed, and that plaintiff and appellee pay cost in both courts.

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ON REHEARING.

LABAUVE, J. In this case a rehearing was granted to the plaintiff and appellee, upon the question whether he is not entitled to the residue of the proceeds after paying defendant's mortgage debt.

As regards the seized debtor, the plaintiff has a privilege and mortgage upon the property seized, but the defendant's mortgage is preferable, and must be paid first, together with the cost of seizure and sale. We believe that justice entitles the plaintiff to the residue.

It is therefore ordered and decreed, that our former judgment be amended, as follows: It is further ordered and decreed, that after paying the defendant's mortgage debt and cost in the seizure and sale, the sheriff do pay to the plaintiff, the residue of the proceeds in dispute, and that as amended, our former decision remain affirmed, the said plaintiff and appellee to pay the cost of the injunction in both courts.

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ON REHEARING.

ILSLEY, J.. A rehearing in this case having been granted, because the judgment was prematurely rendered, as the defendant had not the legal delay to file his brief. We have reexamined our first decree, and the grounds relied upon to reverse it, and we see no reason why our first judgment should be disturbed.

It is therefore ordered, adjudged and decreed, that the judgment last rendered remain undisturbed.

## No. 35.—O. CAPMARTIN v. POLICE JURY.

A warrant drawn and signed by the president and clerk of the police jury, is not binding on the parish, unless the police jury have authorized them to sign the warrant.

**A** PPEAL from the District Court, Parish of Natchitoches, *Lewis, J.*  
*S. M. Hyams, Sr.*, for plaintiff. *C. Chaplin, Sr.*, for defendant.

HYMAN, C. J. Plaintiff brought suit against the police jury of the parish of Natchitoches on several obligations, made and signed by the president and clerk thereof, wherein they, the president and clerk, promised that the parish of Natchitoches would pay the amounts stated in the obligations in current funds, and would also receive them in payment of parish dues.

Judgment was rendered against the jury on the obligations, and it has appealed.

The jury relies on various grounds for the reversal of the judgment.

It is only necessary to notice one of the grounds relied on, to wit: that plaintiff had not shown authority in the president and clerk to bind the jury.

There is no law authorizing the president and clerk to bind the jury, nor is there any evidence adduced, showing that it authorized them to make or sign the obligations sued on.

Let the judgment of the District Court be reversed and annulled, and let the suit of plaintiff be dismissed as of nonsuit, at his cost.

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No. 85.—JOHN C. DOWTY v. DENIS SULLIVAN.

Statements made, or letters written, by an endorser of a promissory note, after the transfer, are not admissible to defeat the action of the holder.

If his testimony can be used at all, it is as a sworn witness in the case.

**A** PPEAL from the District Court, Parish of Rapides, *Cooley, J.*  
*Ryan & White*, for plaintiff. *W. A. Seay*, for defendant.

LSLEY, J. This is an appeal from a judgment in favor of the plaintiff and against the defendant, for the amount of a promissory note by the latter, drawn to the order of and endorsed in blank by the payee, James Madison Wells.

The defendant sets up equities against the payee of the note, who, he alleges in his answer, transferred it to the plaintiff after its maturity, and which equities he pleads against the plaintiff to defeat his action.

In order to establish this defence, i. e., the existence of valid equities and posterior transfer, the defendant offered letters of Wells, written after the transfer, which were objected to, on the ground that Wells was not a party to the suit, nor a sworn witness.

Statements made by Wells, after he had transferred the note to defeat the plaintiff's action, were not admissible. If his testimony could be used at all, it was only as a sworn witness in the case, so that the plaintiff could cross-examine him.

The letters were properly excluded.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, at the costs of the appellant.

## No. 77.—N. E. WRIGHT, Administrator, v. A. J. STACEY.

A contract to serve in the Confederate army as a substitute for an other was unlawful, and carried with it no legal obligation.

The doctrine, in the case of Schmidt v. Barker, (17 An. 264) reaffirmed.

This Court will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it without any plea at any stage of the proceedings.

Parties cannot be heard, who ask relief from a violation of law.

The Court leaves them where their conduct has placed them, and in *pari culpa melior et conditio possidentis*.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J.*  
*Looney & Nells*, for plaintiff. *J. W. Duncan*, for defendant.

*ILSLEY, J.* This is an appeal from a judgment in favor of the plaintiff against the defendant, for the sum of five hundred dollars in coin, with interest and costs. The obligation upon which the action was based is transcribed below, as follows:

“SHREVEPORT, November 29th, 1862.”

“Due Thomas Armstrong, or his heirs, five hundred dollars in coin, at the conclusion of peace between the Confederates and the United States of America, or at the termination of said Armstrong’s term of service, should said Armstrong remain in the army as a substitute for the undersigned, A. J. Stacey. Should the said Armstrong not remain in the above written service, then this note to be null and void.”

The defence set up was that the obligation sued on was contrary to law, and that if the same was lawful that the obligee had failed to perform his part of the contract. A voluntary engagement to aid a rebellion against the United States, which it is evident from the testimony the defendant’s engagement was an undertaking illegal and immoral, and no action lies upon such a contract.

This Court said in *Schmidt v. Barker*, 17 An. 264, what we now again repeat: “This Court will not lend its aid to settle disputes relative to contracts reprobated by law.

“It will notice their illegality *ex officio*, and allow it without any plea at any stage of the proceedings.

“Parties cannot be heard, who ask relief from a violation of law.

“The Court leaves the parties where their conduct has placed them, and in *pari culpa melior est conditio possidentis*.” See also *Davis v. Holbrook*, 1 An. 178; *State v. Lazaree*, 17 La. 132.

It is therefore ordered, adjudged and decreed, that the plaintiff’s suit be dismissed at his costs, in both courts.

## No. 78.—MICHAEL AND HENRY BOYCE v. THOMAS C. HUNT et als.

Where a party sells a tract of land on time, and takes the notes of the vendee, secured by mortgage on the land to secure the payment of the price, and the vendee, before the price is paid, sells the same land to another party, who assumes the mortgage in favor of the original vendor, the first vendor may have the land seized and sold to pay his mortgage, and the second vendee cannot set up, by way of exception, that the suit be dismissed as to him.

The original vendee of the land may be sued on the notes, and the mortgage enforced on the land of his vendee in the same suit.

**A** PPEAL from the District Court, Parish of De Soto, *Weems, J.*  
*Elam & Wemple*, for plaintiffs. *R. J. Bowman*, for defendant.

*Brief of Elam & Wemple, for plaintiffs and appellants.* \* \* Petitioners prayed for personal judgment against Hunt & Gillespie, as the makers of the notes, and against Whitworth & Poag and Bonds, on their stipulation, that their mortgage be recognized and enforced, the lands be seized and sold in satisfaction thereof.

Bonds alone appeared, and put in the following exception: "In this case the defendant, James Bonds, excepts to the plaintiffs' petition upon the following grounds, viz: That the cause of action against T. C. Hunt is entirely distinct and separate from that set forth against this defendant, the rejection or the success of the one, not involving the rejection or success of the other, and the same demands being separate and distinct, and against separate parties cannot be cumulated. Wherefore, the defendant prays that plaintiffs be ordered to elect which of said demands he will prosecute, and in the event of his refusal to elect, that this suit be dismissed, and for costs and general relief.

Upon this exception, the following order was entered by the Court: "October 13th, 1866."—"Exception sustained."

If we understand this exception, it is to the effect that the personal and the hypothecary action cannot be cumulated against Bonds, if so, these actions cannot be maintained against him while the suit is pending against Hunt. The first question to be considered is, whether Bonds and Whitworth & Poag are personally liable to these plaintiffs, by reason of the stipulation already referred to in the act of sale from Hunt to them in favor of plaintiffs; and if so, what is the character of the obligation thus incurred by them. Articles 1884 and 1896 of the C. C., expressly provide that a stipulation made by one of the parties to a contract in favor of a third person, whereby he agrees to pay a sum of money or to give a particular thing is binding, although the party in whose favor the stipulation is made is no party to the contract, and when accepted by him the stipulation becomes irrevocable. The stipulation of Bonds and Whitworth & Poag in favor of the plaintiffs, having been accepted by them by the institution of this suit become irrevocable, and gave rise to the real and personal action they have brought and can be cumulated, and all the parties who are bound for the debt may be joined in the same action, whether the obligations of the parties are *in solido*, or several; if *in solido*, the plaintiffs may proceed against all of them in the same suit, if in the same jurisdiction; and if several, as is the case, so far as Bonds and his co-obligors, Whitworth & Poag are concerned, they must all be joined in the same suit. And it may be proper to observe further, in this connection, that they are third possessors of the whole tract of land hypothecated, purchased by them in indivision, and it was necessary they should be joined in the same action, even if the hypothecary action had alone been resorted to, reserving their right to institute a personal action in the event the hypothecated property should be insufficient to pay the debt. Bonds and Whitworth & Poag, we think we have shown, are personally responsible for the debt sued for, as much as they had been parties to the contract of mortgage *ab initio*, because they made themselves parties to it in the manner we have already shown. If this position be correct, how it can be said that the cause of action set up against Hunt & Gillespie and Whitworth & Poag, is distinct from that set up against



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Bonds, and therefore cannot be cumulated, we are at a loss to perceive.

We repeat it, if these third possessors are liable to plaintiffs, personally, because, although not parties to the act of mortgage at the time it was passed, they having made themselves so subsequently, then it follows that if we could have cumulated the personal with the hypothecary action against Hunt & Gillespie, if they had not parted with their title and possession, we can join all the parties to the contract in the same suit, and cumulate both demands against them.

Will it be pretended in the case we have assumed, that we could not pray for a personal judgment against Hunt & Gillespie. The recognition of our mortgage and privilege, and that the land be seized and sold to pay the debt. That we could have elected to proceed by personal action against all these parties or by hypothecary action seems to be conceded; but it is said, although this is true, the remedies given by the law must be exercised separately, and not cumulatively or such at least, it seems to us, is the line of argument counsel's exception must force him to assume, if we apprehend him.

If the judgment of the lower Court be affirmed, sustaining the exception, it must be on the ground that although all these parties are liable for the debt in person, and the land is liable to our hypothecary action, yet we must elect to pursue one remedy at a time, such a ruling would lead to circuitry of action, which is opposed to our system of pleadings and the policy of the law, except when it is necessary to enable a party to make his full defence on the merits.

In conclusion, we submit that the following authorities settle all the questions of law and practice raised by the pleadings in this case, and support the views we have submitted. See C. P. Art. 35. C. C. Articles 3366 and 3368. *Twitchell v. Andry and Wife*, 6 R. 407. *Mitchell v. Cooley*, 5 R. 241. *A. Bonnafe & Co. v. John and E. McLane*, 5 A. 225.

*Brief of R. J. Bowman, for defendants and appellees.*—The appellant has correctly stated the facts which has given rise to this litigation.

Upon these facts he has cumulated two distinct actions: a personal action against the appellant, on his assumpsit in favor of the plaintiffs, and a hypothecary action against him as third possessor.

The exception of the appellant is, that these actions cannot be cumulated.

We submit it as axiomatic, that no two actions can be cumulated unless the rights involved by them are homogeneous.

In these, they are distinct and dissimilar. If sued upon, his assumpsit to the plaintiffs; the plaintiffs occupy to him the same position as their vendor, Hunt, and must warrant against all, the mortgages which Hunt left upon the land. 9 An. 195. "A purchaser, who, as part of the consideration, stipulated with his vendor, to pay a debt due by him, may, when sued by the person to whom the debt was due, set up the same equities that he has against the vendor himself."

The hypothecary action cuts off these equities, and therefore does not involve the same or even similar rights.

Again: as third possessor, the appellee has a right to the increased value which his improvements have given the land mortgaged. The 3370

Art. of the C. C., after declaring his liability for deteriorations caused by him declares, "but he can claim for his expenses and improvements only to the amount of the increased value, which is the result of the improvement made."

The interpretations we have placed upon this article are sustained by Judge Porter, in the case of *Lanusse v. Lanna*, 6 N. S. 114, as clear and unequivocal, and the only difficulty presented in that case "was how this value is to be ascertained."

In the direct action on the appellee's stipulation in favor of the plaintiffs, the appellee is entitled to demand of the plaintiffs that he should free the lands from the incumbrances placed on it by Hunt, or give him security against them, and warrant his title against all evictions.

In the hypothecary action, the appellee would have the right to demand payment for the increased value given the land by the improvements made by him. Here then are two distinct and different rights and liabilities, as distinct as an action on a promissory note and a petitory action. If then our axiom, "that two actions cannot be cumulated unless the rights involved are homogeneous," be an axiom, we submit that the exception was well taken, and the judgment of the District Court ought to be affirmed.

LABAUVE, J. This suit is brought on eight promissory notes, amounting together to \$20,123 51 in principal, executed by Hunt & Gillespie in favor of the plaintiff, for the price of a tract of land sold by plaintiffs to said Hunt & Gillespie, on the 13th September, 1858, the land remaining specially mortgaged to secure the payment of said notes. On the 2d day of June, 1862, George E. Gillespie, the co-proprietor of Hunt, reconveyed his undivided half to the said Hunt, who obligated himself, in part consideration for said sale, to pay the mortgage in favor of plaintiffs; and afterwards, on the 23d April, 1863, said Hunt resold the whole tract of land to John J. Whitworth and John Poag, composing the firm of Whitworth & Poag, and James Bonds, in the following proportions: One undivided half to Whitworth & Poag, and the other undivided half to James Bonds. The said purchasers, as a part of the price, assumed the mortgage debt due the plaintiff.

The plaintiffs prayed for a personal judgment against Hunt & Gillespie, the original purchasers and makers of the notes, and against Whitworth & Poag and Bonds, on their assumption of the mortgage debt, and that their mortgage be recognized and enforced, the land seized and sold.

James Bonds alone appeared, and filed the following exception:

"In this case the defendant, James Bonds, excepts to the plaintiffs' petition, upon the following grounds, viz: That the cause of action against T. C. Hunt is entirely distinct and separate from that set forth against this defendant, the rejection or the success of the one, not involving the rejection or success of the other, and the same demands being separate and distinct and against separate parties, cannot be cumulated. Wherefore, the defendant prays that plaintiffs be ordered to elect which of said demands they will prosecute, and in the event of his refusal to elect, that this suit be dismissed, and for costs and general relief."

This exception was sustained, and the plaintiffs appealed.

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We are clearly of opinion that the Court erred. The defendants are hypothecarily bound as holders of the mortgaged property, and personally bound under their assumption of the mortgage debt due the plaintiffs. We understand the suit to be that the defendants pay the mortgage debt due the plaintiffs, and that the mortgage be recognized, and the land seized and sold to pay said debt.

It is therefore adjudged and decreed, that the judgment appealed from be annulled and avoided; it is further ordered and decreed, that the exception be overruled and the case remanded, to be proceeded with according to law, and that the appellee pay costs of appeal.

No. 38. — T. R. SIMPSON, for use, etc., v. JOHN M. LEWIS, et al.

Where the sheriff and his sureties have been made liable for acts of misfeasance in office, committed by the deputy, they have the right to proceed against that party and his sureties to recover the amount they have been condemned to pay the creditor on account of the misconduct of the deputy.

It takes the same length of time to proscribe an action against the deputy-sheriff by the sheriff and his sureties, for misfeasance in office, that it does for the sheriff to proscribe against the creditor, viz : two years.

In a suit against the sheriff and his sureties, the deputy was called in warranty by the sheriff ; judgment was rendered against the sheriff and his sureties, and against the deputy in warranty, the defendants appealed, but the deputy allowed the judgment in warranty to stand, without joining in the appeal: *Held*—That, the judgment of the lower Court against the deputy as warrantor was *Coram non judice* in the appellate Court, and must be considered as *res judicata* against the deputy; who, having specially plead it in his answer in the suit against him by the sheriff as *res judicata*, he asserted its validity, and cannot aver its nullity when invoked against him.

The sureties of the deputy are in the same attitude with their principal: Their obligation arises *ex contractu* and not *ex delicto*.

**A** PPEAL from the District Court, Parish of Caddo, *Creswell, J.*

*Wright & Duncan*, for plaintiffs. *A. B. Levissee*, for defendant.

*Brief of Wright & Duncan, for plaintiff.*—In the month of December, 1856, John R. Marshall & Co., and Peet, Sims & Co., instituted suits against T. R. Simpson, sheriff of Caddo parish, and his sureties, N. Moore, J. P. Hailey, and Henderson Markham, to recover damages for alleged misfeasance in the performance of an official act on the part of J. M. Lewis, one of Simpson's deputies.

The defendants answered, specially denying that plaintiffs had been damaged by any misfeasance or neglect of duty on the part of defendant or his deputy, J. M. Lewis, and concluded by calling the said Lewis in warranty, who answered, also denying the allegation of misfeasance, as well as his liability to defendant as warrantor.

Judgment was rendered against Simpson and his sureties for the sum of \$2,200, with five per cent. per annum interest from judicial demand, and in Simpson's favor against Lewis for the same amount. From this judgment defendants appealed. The Supreme Court divided and reduced the judgment of the District Court, awarding to John R. Marshall & Co., the sum of \$1,054 25 with interest, and Peet, Sims & Co., the sum of \$778 75 with interest also. (R., p. 16; 13 A., 437.) This judgment was satisfied by the sale of defendants' (Hailey's and Markham's) property.

The judgment of the District Court was rendered on the 1st of May, 1859; that of the Supreme Court, on the 22d July of the same year.

About the third day of November, 1859, Simpson instituted the present suit for the use of Hailey and Markham, against Lewis and his sureties to recover the amount which they had been compelled to pay under the judgment above referred to. The defendants answered, setting up the judgment of the Supreme Court as *res judicata*, and specially denying that Lewis was guilty of any misfeasance or neglect of duty in the premises, averring that if he was, the said Simpson knew of the same and ratified it, and concluding with the plea of prescription of one and two years, judgment was rendered sustaining the plea of *res judicata* as to Lewis, and dismissing as in case of nonsuit as to Battle, George, and Ford. From this judgment plaintiff has appealed.

The records in the cases of *J. R. Marshall & Co.*, and *Peet, Sims & Co. v. T. R. Simpson, et als.*, Nos. 4,795 and 4,796, (consolidated,) which were received in evidence without objection or restriction, (6 A., 110; 3 ib. 42,) and other testimony adduced, establish the following facts, to wit: that on the 16th of April, 1856, J. R. Marshall & Co., and Peet, Sims & Co. obtained judgments *in solido* against D. H. Mallory and Thomas D. Waddell, in the District Court for Caddo parish, for the respective sums of \$3,756 and \$3,370, with eight per cent. interest, which judgments were duly recorded; that on the 23d of June following, writs of *feri facias* were issued on said judgments and placed in the hands of one of the deputies of T. R. Simpson, to wit: the defendant J. M. Lewis, who had duly qualified and given bond; that at the time said writs were placed in the hands of said Lewis, certain property, to wit: two slaves, were pointed out to him for seizure as the property of the judgment debtor, which were then in the hire of W. W. Harper, and on his plantation in the parish of Caddo (13 A. 437); that instead of executing the writ in the manner directed, said Lewis went to Greenwood and there gave information to Daniel Waddell, the father and agent of the judgment debtor, that he had such a writ in his possession, but made no attempt to execute it; (testimony of Mr. Harper, pp. 42, 43, and also opinion of S. C.); that within twenty-four hours after the father of Waddell had received this information, the property pointed out was spirited away and placed beyond the reach of legal process (R., pp. 6, 12, 42; Sup. Trans., pp. 1, 2, 3.) Upon this evidence judgment was rendered against Simpson and his sureties, and in favor of the former, against Lewis, as warrantor, and this evidence, I here confidently submit, entitles the plaintiff to judgment in this suit, unless the defendants can show some new matter of defence or avoidance.

The first matter of defence set up is the plea of *res judicata*. This part of the answer is so obscure, that it is difficult to ascertain with certainty what is intended. Is the decree of the Supreme Court set up as *res judicata* in their favor? or as *res judicata* against them? As *autrefois acquit*? or *autrefois convict*? As the subsequent proceedings in the case throw no light upon this point, we must await the further developments of the learned counsel for the defendants.

In the meantime, however, let us inquire how far the judgments rendered against the defendant Lewis, as warrantor in the two cases, Nos.

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4795 and 4796, (consolidated,) and the final judgment against Simpson and his co-defendants in the Supreme Court, affect the co-defendants and sureties of Lewis in this case. The District Court, as we have seen, rendered the same judgments against Lewis in favor of Simpson, as against Simpson and his sureties, in favor of the plaintiff in these suits. Simpson and his co-defendants and sureties appealed from the judgment against them, but Lewis never appealed from the judgment against him as warrantor. True, he joined Simpson, and the other defendants in their appeal, and signed the bond with them as a principal, but he never appealed from the judgment against himself directly as warrantor. At least he never gave bond in such an appeal. The bond he signed was in favor of the plaintiffs, who had nothing to do with the judgment against him, and could not have claimed the benefit of it, (14 A., 61,) and not in favor of Simpson, for whose benefit the judgment was rendered. The Supreme Court evidently did not consider the judgment in warranty before them, because no mention whatever is made of it in the case (13 A., 437). Now what consequences result from these facts?

In the first place, the unappealed judgment of the District Court against Lewis, has become *res judicata*, as to him, to the same extent that the definitive judgment against Simpson and his co-defendants is *res judicata* as to them (19 L. 395; 12 R. 437) and, in the second place, by making himself a party to Simpson's appeal, and at the same time omitting to ask for any change in the judgment against himself as warrantor, Lewis is bound by the decree of the Court on that appeal, and it is *res judicata* against him.

*Brief of A. B. Levisse, for defendant.* \* \* \* The misfeasance complained of falls under the denomination of *quasi-offences*. C. C., 2294, 2295; *Semple, et al v. Buhler*, 6 N. S., 665; *Fisk v. Browdon*, 6 N. S., 691; *Wood v. Foster*, 3 L., 338. Vide also 2 N. S., 24; 13 A. 437.

The right of action growing out of such offences is prescribed by one year. C. C., 3501. Vide cases above cited, and 3 N. S., 585; 2 A., 400.

Prescription begins to run in all such cases from the date of the act complained of. C. C. 3502; 6 N. S. 691, *Balfour v. Browder*, 6 N. S. 708.

The date of the misfeasance in this case is sufficiently fixed by the date of the writs, and the testimony of W. W. Harper, say 1st July, 1856.

Prescription continued to run without interruption, until the acceptance of service by the defendants in this suit, and as the acceptances of service are without date, the interruption can be determined only by the date of the appearance and filing of the answer, to wit: 25th March, 1858.

We therefore respectfully submit that the plaintiffs' action is prescribed as to all the defendants, and that they are entitled to a final judgment in their favor.

Objections urged against the foregoing argument:

First. It will probably be objected that this case is to be governed by the prescription of two years, instead of one, under the act of 1837. Vide Acts of 1855, p. 367, sec. 10.

We contend that Lewis was not a sheriff within the provision of this act, and that especially between him and Simpson, his principal, the case is to be decided by ordinary prescription of one year.

But even if Your Honors should be of opinion that the case is to be gov-



erned by the term of two years instead of one, it does not alter the case, as much more than two years had elapsed before any interruption took place.

Second. It will also probably be claimed by the plaintiff that prescription was interrupted by the citation to Lewis on his call in warranty.

To this we answer that, Lewis not being a necessary party to the suits of *Marshall & Co.*, and of *Peet, Sims & Co. v. Simpson*, the appointment of a curator *ad hoc* to represent him, and the posting of citation, etc., were without any legal effect whatever as against said Lewis or his co-defendants herein, either as the basis of a valid judgment or to interrupt prescription. *Hill v. Barlow*, 6 R., 143; *Dupey v. Hunt*, 2 A., 562; *Smith v. McWaters*, 7 A., 146; *Cox v. Bradley*, 15 A., 529.

In the next place, if the Court should be of opinion that as to Lewis the case falls within the act of 1837, and that the prescription of one year does not apply as to him; and further, that the posting of the citation has the effect to interrupt prescription as to him, it is palpable that, as to his co-defendants in this suit, the prescription of one year is applicable and not that of two, for it certainly cannot be said that the sureties on a private bond given by a deputy-sheriff, are sheriffs or the sureties of a sheriff, within the meaning of the act of 1837. And the necessary time had run as for them before the attempted citation to Lewis in the suits of *Marshall & Co.*, and *Peet, Sims & Co. v. Simpson*, sheriff; and again, the necessary time ran *after* that citation, and even after the judgment of the Supreme Court on those cases at the July sitting of 1858, before the commencement of the present suit. \* \* \* \*

TALIAFERRO, J. In two separate actions against D. H. Mallory and T. D. Waddell, judgments were obtained against them and executions issued. The defendant, Lewis, the deputy of the plaintiff, then sheriff of Caddo Parish, having these executions in his hands was instructed to seize certain slaves pointed out to him as property of Waddell. Failing to make the seizure as instructed by the attorneys of the judgment creditors, and no other property being found upon which the executions could be levied, recourse was taken upon Simpson, the sheriff, and his sureties. Judgments were rendered against them for the amounts claimed, with judgment over against Lewis, the deputy, called in warranty by his principal. On appeal to this Court the judgment was modified. (13th Annual, 437.) Execution issued on the amended judgment and was satisfied by the seizure and sale of the property of Hailey and Markham, sureties of sheriff Simpson. The present suit is brought for their benefit against Lewis, the deputy, and his sureties.

The defence is a special denial of any misfeasance in office on the part of Lewis, the deputy-sheriff; the prescription of one and two years and the judgment of this Court in the case referred to is set up as *res judicata*. Judgment was rendered in the Court below sustaining the plea of *res judicata* as to Lewis, and dismissing as in case of nonsuit as to the other defendants.

From this judgment the plaintiff has appealed. It does not appear that the defendant, Lewis, appealed from the judgment rendered against him as warrantor in the suit by the judgment creditors against the

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sheriff and his sureties. He signed with the defendant, Simpson, and his sureties, an appeal bond in favor of the plaintiffs, but the plaintiffs had obtained no judgment against him. He gave no bond in favor of the only party that did obtain judgment against him. There being then no appeal from the judgment so far as it affected him, the decree of the lower Court rendering judgment over against him was *coram non judice* in the appellate Court, and hence no action was taken by that Court in regard to it. We cannot adopt the view which the defendants seem to take of the condition of the case after the revision of the judgment by the appellate Court. That Court, very properly it seems, annulled and reversed the judgment of the Court of the first instance, in order to correct a manifest error as to the amount that was awarded to the plaintiffs; it could only act upon what was before it by appeal. The judgment of the lower Court in favor of the principal against his deputy not appealed from, must therefore be considered as *res judicata* against the deputy, and not *res judicata*, as contended for by the defendants, in his favor.

This judgment the defendants hold is a nullity, if it does not inure to their benefit. This would be using it both as a sword and a shield. Having specially plead it in their answer as *res judicata*, they asserted its validity, and cannot aver its nullity, when invoked against them.

The plea of prescription we think cannot avail the defence. The act of misfeasance complained of occurred in the month of June, 1856, by the omission of the deputy-sheriff, to seize property under the execution placed at that time in his hands. The suit to render the sheriff and his sureties liable was instituted in the December following, less than one year from the date of the omission complained of. Service of citation on Simpson, the sheriff, was made on the 30th December, 1856. From that time until the final decree, of the appellate Court in the case, about the 1st of August, 1858, suspension of prescription took place.

The suit to recover from the deputy and his sureties the amount paid by the sureties of the sheriff was filed 3d November, 1859, and the defendants answered on the 17th of April, 1860, less than two years from the date of the decree of the appellate Court.

But it is contended by the defendants that if the deputy sheriff was liable, as alleged, he was guilty of a gross offence and could not be proceeded against after the lapse of one year, and that his sureties occupy the same position in that respect that he does. They hold, moreover, that the prescription of two years as fixed by law (Revised Statutes, p. 524, section 10,) applies only to sheriffs and not to their deputies. The law referred to provides that "the sheriffs and their sureties shall be able to prescribe against their acts of misfeasance, nonfeasance, costs, offences and quasi-offences, after the lapse of two years from the day of the omission or commission of the acts complained of." Although deputy sheriffs are not named in the statute, a fair construction of it, we think, will authorize the conclusion that they are embraced in its provisions.

The sheriff and his deputy are, in a legal sense, the same person, the act of the deputy is the act of the sheriff. *Qui facit per alium, facit per se*. The law would be anomalous, if after the lapse of one year from the time of

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an act of omission or commission by a deputy-sheriff, the sheriff were made responsible for it, without recourse upon the deputy who had caused him the injury. If the prescription of one year shielded the deputy, the sheriff would be without redress against his deputy for all acts of the deputy for which the sheriff might be made liable after the lapse of one year, for the reason that no cause of action against the deputy would arise until his principal was proceeded against. An action against the deputy for misfeasance in office brought by the sheriff is essentially of the same nature as an action brought for the same cause against the sheriff, and the prescription of such an action must stand upon the same basis. The sureties of the deputy are in the same attitude with their principal. Their obligation arises *ex contractu* and not *ex delicto*.

On the merits, the judgment being against the deputy, it is *prima facie* evidence against the sureties. The prescription against them, they endeavor to rebut by aiming to show that the property which the deputy sheriff was required to seize by the judgment creditors did not belong to the defendant in execution. A sale of these slaves, two of which were pointed out by the creditors or their agents as belonging to the defendant Waddell, was it seems effected by him to Mallory, his father-in-law, living in Panola County, Texas. This sale, it appears, bears date about the 27th March, 1856. This sale, the plaintiffs resist as being simulated and unfounded. To make out the simulation, they show, that at the time it purports to have been made, Waddell was threatened with heavy judgments, which a few weeks afterwards were rendered against him. That the property conveyed was the only property out of which these judgments could be made. That the slaves required to be seized remained in possession or under the control of the defendant until some time in the month of June, after the alleged sale took place. That Mallory permitted one of the three slaves to be seized and sold for a debt of Waddell, after the pretended purchase, without asserting any claim to the slave. That no registry of the sale was made in this State, and that the slaves were not delivered to Mallory, the purchaser, until the 1st of June, nearly six weeks after the judgments, of the creditors, Marshall & Co. and Peet, Sims & Co., had been rendered and recorded. The tenor of the evidence satisfies us that the pretended sale was a mere simulation, and that no title passed to Mallory. It does not appear that the deputy required an indemnity from the creditors when they required him to seize the two remaining slaves, and it is not probable that he believed them to be the property of the vendee. On the contrary, it is clearly shown that the deputy-sheriff, after he received the execution, instead of proceeding to seize the property at once as required, went to the residence of the defendant's father and informed him that he held an execution against the property of his son; that the father on the next day had a conversation with the witness, Harper, who had the slaves then in his possession under hire, during which interview the witness informed him that a sale of the slaves in Texas, without registry in Louisiana, would not keep them from seizure by Waddell's creditors, and the witness testifies that on that night the slaves disappeared.

We think the plaintiffs entitled to a reversal of the judgment of the lower Court, and of judgment in their favor.

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It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the plaintiffs recover from the defendants, *in solido*, (for the use of Henderson, Markham and John P. Hailey,) the defendants being John M. Lewis, H. J. G. Battle, Samuel Ford, Lawrence P. Crain and W. W. George, the sum of one thousand and fifty-four dollars and twenty-five cents, with five per cent. interest thereon, from the 2d day January, 1857, and the further sum of seven hundred and seventy-eight dollars and seventy-five cents, with like interest, from the day last named, and the further sum of one hundred dollars and fifteen cents. And it is further ordered that said defendants and appellees pay all costs of this suit in both Courts.

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No. 84.—JONAS PLATT v. JOHN L. MAPLES.

A receipt which acknowledges payment is merely *prima facie* evidence of payment, but is not conclusive proof.

Where the consideration of a contract is unlawful on its face, it cannot be ratified, so as to authorize the Courts to enforce it. A contract of sale is incomplete until the delivery of the thing sold. C. C. 2450.

**A**PPEAL from the District Court, Parish of Bossier, *Weems, J.*  
*L. B. Watkins*, for plaintiff. *R. W. Turner*, for defendant.

HYMAN, C. J. Plaintiff brought suit on a written instrument, in the following words, to wit:

"Received from Jonas Platt, the sum of twenty-seven hundred and eighty-seven dollars and twenty cents, in full payment of thirty bales of cotton, weighing 13,936 pounds, at twenty cents per pound. I agree to keep said cotton protected from the weather, and to deliver the same in good order at the Dorchete landing, near the town of Minden, when ordered so to do by the said Platt, all loss by fire or capture at the risk of the purchaser. This the 30th day of January, 1864.

JOHN L. MAPLES, BY EMMA MAPLES."

Which he alleged to be a written obligation, and asked for judgment against defendant for thirty bales of cotton, or their value.

Defendant, in answer, admitted that he executed the instrument, but averred that he received Confederate treasury notes for the cotton mentioned therein.

Judgment was rendered in favor of defendant and against the plaintiff for cost of suit, and the plaintiff has appealed from the judgment.

On the trial of the case in the lower Court, defendant offered to prove by oral evidence that the amount stated in the instrument to have been paid, was paid in Confederate treasury notes.

Plaintiff objected to the introduction of this evidence, on the ground that parol evidence could not be received to contradict the written obligation.

The Judge admitted the evidence, and the plaintiff filed a bill of exception to its reception.

The instrument sued on is not a contract of sale of the cotton, though it fully proves that a sale was made of the same.

It is a receipt for money paid on the cotton sold, coupled with an agreement to take care of and deliver the cotton.

It is clear that, that part of the instrument, which acknowledges the payment of money, may be controverted by parol evidence, as it in no manner contradicts the agreement to take care of and deliver the cotton. A receipt which acknowledges payment is merely *prima facie* evidence of the fact of payment, and is not conclusive. See Greenleaf on Evidence, vol. 1, § 305.

The facts of the case do not require of us to decide, whether or not an acknowledgment of payment in a written contract of sale could be contradicted by the parties thereto, with parol evidence.

The evidence in the case satisfies us, that by the contract of sale, the price for the sale of the cotton was to be paid in Confederate treasury notes, issued by the so-called Confederate States of America, to enable them to carry on war against the Government of the United States, of which the parties to the suit were citizens.

The dealing in and contracting for these notes gave credit and confidence to them, and assisted the rebels in the war against the government.

The consideration of the sale of the cotton was unlawful. Such dealing had a tendency to disrupt the government, and can have no effect. See Civil Code, 1887 and 1889.

It is contended that as the defendant delivered a part of the cotton, he ratified the contract. Such contracts cannot be the foundation of a natural obligation, and cannot be ratified. See Civil Code, Article 1751, § 1.

They are immoral.

Plaintiff contends that the instrument sued on, was an executed contract.

Under a contract of sale the vendor is obliged to deliver the things sold, and the contract cannot be fully executed until the things sold are delivered. See Civil Code, 2450.

Courts will not require such a contract to be enforced, at the suit of one of the parties thereto, against the other. *Ee turpi causa non oritur actio.*

Let the plaintiff's suit be dismissed.

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No. 87.—JOHN H. LEWIS *v.* HENRY BOYCE.

This case presents only questions of fact.

**A** PPEAL from the District Court, Parish of Rapides; *Cooley, J.*  
*J. Orsborn*, for plaintiff. *H. A. Boyce* and *J. G. White*, for defendant.

**TALIAFERRO, J.** This suit is brought to recover from the defendant twelve hundred and forty dollars, with interest, claimed by plaintiff to be owing him for overseer's wages. He alleges that his salary, as overseer of two plantations from 4th day of June, 1864, to 14th June, 1865, amounts to the sum claimed, at the rate of one hundred dollars per month.

The answer denies the allegations of the petitioner. The defendant



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specially avers, that his engagement with the plaintiff, was to pay him at the rate of eight hundred dollars per annum, as long as plaintiff remained with him in that capacity, and that payment was to be made in Confederate money. He alleges partial payments made to the plaintiff, and claims the value of a mule belonging to one of the plantations, averring that plaintiff disposed of said mule on his account. He states an account far exceeding the plaintiff's claim, and pleads it in reconvention.

Judgment was rendered in favor of the plaintiff for six hundred dollars, with interest, from 6th of October, 1865, at five per cent. per annum, until paid, subject to a credit of eighty-five dollars. The defendant has appealed. No contract is proved. Services in the capacity stated are admitted. The value of these services is the only matter of inquiry. Several witnesses testify on the subject. A review of the evidence induces us to think that it does not justify so large a sum as that awarded by the judgment. A part of the time it is shown there were but few laborers on one of the plantations; that the employe, a portion of his time, seemed to be doing but little. It is shown by the concurrent testimony of all the witnesses, who testified on the point, that plaintiff is only a second-class overseer or manager on plantations; that no cotton was cultivated on the defendant's premises, and that services of the kind were not worth so much as previous to the war. One witness states that he managed the "Ulster" plantation (one of those in charge of plaintiff) at six hundred dollars a year, before the war.

We think the plaintiff's services would be well compensated by four hundred dollars.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; it is further ordered, adjudged and decreed, that the plaintiff recover from the defendant the sum of four hundred dollars, subject to a credit of eighty-five dollars, with interest, at the rate of five per cent. per annum, from the 6th day of October, 1865, until paid, with costs in both courts.

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No. 22.—CLAPP & Co. v. PHELPS & Co.—GRIFFEN & Co., Intervenor.

An intervenor cannot, without the consent of the plaintiff, substitute himself in the place and stead of the defendant. C. P. 380, 390.

An intervenor stands in the character of plaintiff before the Court, as to the nature of the title, and the object of his demand, and is governed in his pleadings by the rules of practice which apply to plaintiffs in principal demands. C. P. 172.

Where the defendant, in his answer, filed in the cause, neither denies the legal right of the plaintiff to recover nor the truth of the allegations of the petition, they are taken by the Court to be confessed, and the plaintiff is dispensed from the necessity of adducing proof in support of his demand.

An intervenor cannot be permitted to bond property in the custody of the sheriff under a sequestration: The right to bond is only given by law to the parties to the action; first, to the defendant; and if he neglects to exercise the privilege in ten days after the seizure, then to the plaintiff.

The order to bond property under sequestration must be rendered by the Judge.

Clerks of Courts have no authority to render such orders.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J.*  
*T. T. & A. D. Land*, for plaintiffs. *Hicks & Hall*, for defendants.

**LESLY, J.** From a judgment rendered in favor of the plaintiffs for the cotton claimed in their petition, the intervenors, Griffen & Co., have

appealed, and in this Court have filed an assignment of errors, on which they rely for a reversal of the judgment.

We shall consider the errors assigned in the order of assignment:

1. That the Court below erred in refusing to permit the intervenors to appear and plead as defendants in the action, in the place and stead of the defendants, Phelps & Co.

I. An intervenor may join either plaintiff or defendant in the principal action, or he may oppose both when his interest requires it, but he cannot, without the consent of the plaintiff, substitute himself in the place and stead of the defendant. C. P. 389, 390, and amendment. If the law were otherwise, the legal rights of a plaintiff might be entirely defeated. A demand in intervention is but an accessory to a main action. *Todd v. Spouse*, 14 An. 427.

2. That the Court erred in dismissing the petition of intervention, on an exception filed by the plaintiff.

II. The exception was to the petition, on the ground that it did not disclose the origin and nature of the pretended title of the intervenors, the name and residence of the vendor of the intervenors, nor the place, price, or any other circumstance of a contract of sale, or other mode of acquiring title to property. The plaintiffs, in their exception, prayed the Court to order the intervenors to amend their petition, in the particulars or circumstances mentioned, and in default, to dismiss it, on the ground of vagueness and uncertainty in its allegations. The Court sustained the exception, and granted leave to the intervenors to amend their petition, but they refused to amend, and the petition was dismissed as prayed for in the exception. An intervenor stands in the character of plaintiff before the Court, *as to the nature of his title*, and the object of his demand, and is governed in his pleadings by the rules of practice which apply to plaintiffs in principal demands. C. P. 172. *Hennen's Digest*, Verbo Pleadings, v. (a) (3.)

3. That the Court erred in rendering judgment in favor of plaintiffs, upon the answers filed by the defendants, Phelps & Co.

III. The answer of the defendants was a disclaimer of any title or ownership of the cotton on their part, and as a disclaimer of title and ownership the answer neither denied nor put at issue any of the allegations of the plaintiff's petition.

The object of pleading is to present an issue, either of law or of fact, on which the Court can pass a judgment between the parties to the suit, and when a defendant, in his answer, filed in the cause, neither denies the legal right of the plaintiff to recover, nor the truth of the allegations of his petition, they are taken by the Court to be confessed. *Nennier v. Coist*, 5 M. 56. 4 N. S. 615.

The plaintiff, in such a case, is dispensed from the necessity of adducing or administering proof in support of his claim or demand.

4. That the Court erred in refusing to set aside the judgment, dismissing the petition of intervention; and also, in refusing to set aside the judgment rendered in favor of the plaintiffs, on the answer filed by the defendants.

IV. For the reasons stated in considering second and third assignments

of errors, the Court below did not err in refusing to disturb the judgment; and

5. That the Court erred in permitting the plaintiffs to bond the cotton, after the intervenors had obtained an order from the clerk of the Court, authorizing them to bond it.

V. The intervenors had no right to bond the cotton under the provisions of the law, and in no case could they be permitted to do so when in the custody of the sheriff under a sequestration, in the absence of a decree or order of the Judge rendered contradictorily between the plaintiffs and the intervenors.

The right to bond property sequestered, is only given by the law to the parties to the action; first, to the defendant; and, if he neglects to exercise the privilege within ten days after the seizure, then to the plaintiff. C. P. 279, and amendments. The order of the clerk, authorizing the intervenors to bond the cotton, was without warrant or authority of law, and was therefore without any legal effect, and it was the duty of the District Judge to disregard the action of the clerk, and to grant an order to bond in favor of the plaintiffs, the parties legally entitled to it.

It is therefore ordered, adjudged and decreed that the judgment of the lower Court be affirmed, with costs.

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No. 105.—EDWARD BENTON *v.* HOPE & TALLY.

Steamboats and other water-crafts, navigating the waters of the United States, are prohibited by act of Congress from transporting freight or passengers, without first obtaining the necessary license or inspection papers from the collector of customs. Contracts of insurance of *affreightment*, made with any steamboat navigating any of the waters of the country in direct violation of law, are null, and cannot receive judicial sanction.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J.*  
*Henderson & Lacey*, for plaintiff. *Wright & Duncan*, for defendants.  
**TALIAFERRO, J.** The plaintiff, as endorsee of W. A. Benton, brings this suit against the defendants *in solido*, on a promissory note drawn by them for \$509, and payable on demand to W. A. Benton or order.

The defendants admit the signature of the note, but aver that it was given to the payee upon false and fraudulent representations of his, that he was authorized by the——Insurance Company to give or sign blank policies of insurance on freights shipped on boats that had failed to obtain inspection papers, and that if loss had occurred, the insurance company would not have been responsible.

It is contended also, on the part of the defendants, that the obligation is one made in violation of a prohibitory law, and null on that account. The plaintiff obtained judgment, and defendants have appealed. It appears that the insurance was taken by defendants on cotton shipped on a steamboat called the "Dillard," which had at the time neither the license from the custom-house nor the certificate of inspection, in default of which the boat could not legally navigate the waters of the United States.

There is no doubt that this boat had been owned in whole or in part by defendants at, or at least a short time before the execution of the note sued upon, which was given in payment of the premium of insurance, taken by them on a load of cotton.

The act of Congress approved July, 1838,——— rigidly prohibits, under heavy penalty, boats of the character of the Dillard from transporting goods, wares and merchandise or passengers. There is no doubt that the condition of the boat was fully known to the plaintiff as well as to the payee of the note, at the time the contract was entered into.

We are of opinion that contracts of insurance upon boats so rigidly prohibited from transporting freight or passengers, made by parties with full knowledge of the prohibition, become affected with the nullity resulting from engagements entered into in direct violation of law. The taking risks, under insurance upon boats navigating the waters of the country, in express violation of law, is an encouragement to violate law; and contracts of that kind should not receive the sanction of judicial tribunals.

The conclusion we have arrived at renders it unnecessary for us to consider the several bills of exceptions we find in the record.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; it is further ordered, adjudged and decreed, that judgment be rendered in favor of defendants, the plaintiff and appellee paying costs in both courts.

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No. 95.—ALEXANDER NORTON *v.* JOHN H. DAWSON AND JOHN BOGAN.

Confederate Treasury notes were issued to assist the rebellion against the Government of the United States, and the circulating them as money was immoral and against public policy. Parol evidence is admissible to vary or contradict a written contract that is reprobated by law.

**A** PPEAL from the District Court, Parish of Rapides, *Lewis, J.*  
*Lewis & Hunter*, for plaintiff. *Ryan & White*, for defendants.

**LABAUVE, J.** This suit is brought on a promissory note for \$1,000, the consideration of which is proved to be treasury notes of the so-called Confederate States.

Judgment was rendered in favor of plaintiff for \$500 in gold, and the defendants appealed.

Parol evidence was properly admitted, to prove the consideration of the note, although excepted to, and to show that it was Confederate money. This kind of currency was created to assist the rebellion against the Government, and the giving circulation to it was immoral and against public policy, and it is well settled that in immoral and reprobated contracts, parol evidence is admitted to vary and contradict written contracts. We cannot enforce this obligation, according to many decisions of this Court. 5 R. 101. 1 A. 192. 10 A. 199. 12 A. 154.

It is therefore ordered that the judgment be reversed, and the suit dismissed at the costs of the plaintiffs, in both courts.

## No. 106.—J. J. HOPE v. J. W. HOWARD.

Compensation takes place where the demand of plaintiff and defendant are equally liquidated.  
C. C. 225. C. P. 368.

Where the law authorizes the plea in compensation to be made, evidence is admissible to establish the demand.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J.*  
*J. W. Duncan*, for plaintiff. *Land & Land*, for defendant.

**HYMAN, C. J.** Plaintiff sued defendant to recover of him \$600 for rent of land.

The contract sued on by plaintiff was, that defendant should enjoy for one year certain landed property belonging to plaintiff, and that he should pay plaintiff for its enjoyment \$600, less the value of improvements that he should put on the land.

Defendant, in his answer, pleaded in reconvention and compensation, the value of the improvements put by him on the land, and also the price of some cord-wood sold by him to plaintiff.

The Judge rendered judgment, allowing to plaintiff his claim of six hundred dollars against defendant, and to defendant, on his plea in reconvention and compensation, the value of the improvements put by him on the land let, and the price of the wood sold by him to plaintiff.

From the judgment plaintiff has appealed.

Plaintiff relies on one ground only for the reversal of the judgment.

The ground is, that the District Judge erred, in receiving evidence on the plea of reconvention and compensation, set up by defendant for the price of the cord-wood sold by him to plaintiff.

Plaintiff filed a bill of exception to the admission of the evidence, and the objections in the bill are, that his claim was a liquidated one, having been liquidated by the acknowledgment of the defendant, in his answer, and that an unliquidated claim, as was defendant's for the sale of the wood to plaintiff, could not be pleaded in compensation against it, nor could defendant's claim be pleaded in reconvention, because it was not connected with his, plaintiff's claim for rent, and because both parties were residents of the same parish.

The reason of the Judge for admitting the evidence is embodied in the bill of exception; and is, that the demand for the price of the wood claimed by defendant was liquidated, as to the price to be paid, and as much so as plaintiff's demand for rent, and that the answer of defendant does not admit any certain sum to be due to plaintiff.

The defendant had no right to set up the plea in reconvention, as both plaintiff and defendant reside in the same parish, and as the claims were not connected with each other. On that plea defendant had no right to introduce evidence. See Code of Practice, Art. 375, and amendment to the article.

The indebtedness of plaintiff to defendant for the wood was under an agreement at a fixed price, for the cords which defendant might deliver to plaintiff, but there had been no settlement or adjustment as to the



number of cords delivered by defendant, consequently, like the claim for rent by plaintiff, the amount due to defendant for wood was not liquidated.

The evidence shows that the claim of the plaintiff for rent and the claim of defendant for the price of the wood were equally liquidated, and the plea of defendant in compensation for the price of the wood was authorized by the law. See Civil Code, Art. 2205; Code of Practice, Art. 368.

It is not seriously contended by plaintiff that the claim for the price of the wood by defendant, was not as liquidated as his, plaintiff's claim for rent, before defendant filed his answer, but he contends that the effect of defendant's plea of compensation, in his answer, acknowledged his, plaintiff's claim to be due, and fully liquidated it, while defendant's claim remained unacknowledged and unliquidated.

The plea of compensation may have had the effect plaintiff contends for, but the law authorized the defendant to make the plea in that manner, and, consequently, gave him the right to introduce evidence to establish his plea.

The strange position is assumed by the plaintiff, that the adoption by the defendant of a plea in his defence allowed by law to secure his rights, has caused him to lose his rights.

Let the judgment of the District Court be affirmed, with costs.

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NO. 27.—TAYLOR, KNAPP & Co. v. W. T. HANCOCK & Co.

All writs of *feri facias* issued from any of the Courts of this State, must be made returnable into Court by the clerk thereof, in not less than thirty nor more than seventy days from the date of issue. Revised Statutes, page 529.

Where the sheriff omits to return the *feri facias*, within the time fixed by law, without showing the consent of the party in whose favor it issued, he becomes, personally, liable for the debt, which may be recovered on rule after ten days' notice.

The fact that the defendant in execution is insolvent, does not excuse the sheriff from calling on the plaintiff to point out property. He might be insolvent, and still have property liable to seizure.

Where the liability of the sheriff is *prima facie* shown by the return, it is incumbent on him to show a legal excuse for his neglect.

**A** PPEAL from the District Court, Parish of Bossier, *Weems, J.*  
A. B. *Lerisee*, for plaintiffs. L. B. *Watkins* and J. R. *Griffin*, for defendant.

**LABAUVE, J.** On the 15th of September, 1858, the plaintiffs obtained judgment against the defendants, W. T. Hancock & Co., for \$631 78, with eight per cent. per annum, from the 30th of March, 1858, which, on appeal, was affirmed by this Court. On the 20th of August, 1859, a *feri facias* was issued, and put in the hands of the sheriff, who, through his deputy, made the following return upon it:

"I certify that I received this writ on or about the 20th of August, 1859, and the defendants, having no property out of which I could cause

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to be made the amount of money in this suit; and the plaintiffs and their attorneys, failing to show or point out property, I hereby return this writ of *feri facias* not satisfied, the return-day having long since expired.

(Signed)

"C. C. NOWELL, Deputy Sheriff."

"Filed January 17th, 1860."

On the 20th of May, 1861, plaintiffs took a rule on Austin Miller, administrator of the succession of L. F. Steele, the sheriff, then deceased, to show cause why the said succession should not pay said judgment, because of the neglect of said sheriff, to return the said writ of *feri facias* within the legal delay.

On the 22d of March, 1862, plaintiffs amended their rule, and extended it to Robert T. Stinson and Austin Martin, as sureties of said sheriff.

Austin Miller, having died, the rule was revived against Mattie Steele, surviving widow of Steele, and administratrix of his succession.

The principal defence is, that the defendants in execution were notoriously insolvent at the date of the issuance of said *feri facias*, to the knowledge of plaintiffs' counsel, etc.

Judgment was rendered against plaintiffs, and they appealed.

This case must be tested under the following statute:

"That all writs of *feri facias*, issued by the clerks of the several Courts throughout this State, shall be made returnable by them in not less than thirty days nor more than seventy days. It shall be the duty of each of the sheriffs of the different parishes in this State, to return all writs directed to them, into the clerk's office from which they issued, on or before the return-day mentioned therein, and also to pay over any moneys received thereon to the party entitled to the same, or their attorneys; and in default of any of the duties imposed on him in this section, he shall become liable to the party entitled to the benefit of the writ for the full amount specified therein, which shall be recovered, on motion, before the District Court in the parish in which said sheriff resides, after ten days' notice." Revised Statutes, p. 527, § 2.

The sheriff's return does not show that he ever called, either on the defendants in execution or on the plaintiffs, to point out property as indicated in Arts. 726 and 727 of the Code of Practice. The sheriff, on the face of his return, shows his responsibility under the law; although, the defendants in execution were insolvent, this did not dispense the sheriff from calling on the plaintiffs to show property; the judgment debtors might have been insolvent, and yet have had property which could be seized and sold to satisfy the execution. The seizure of property gives a privilege to the seizing creditor.

The liability of the sheriff, being *prima facie* established on the face of his return, it was incumbent on him, in order to avoid responsibility for the amount of the writ, to show a legal excuse, and the plaintiffs were not bound to prove that they had been damaged, notwithstanding the insolvency of the defendants in execution.

We are of opinion that the sheriff made himself liable, and that the defendants in the rule have failed to show a legal excuse. 11 An. 273. 12 An. 419. 13 An. 153, 329.

It is therefore ordered and decreed, that the judgment of the District Court be annulled and avoided; it is further ordered and decreed, that

the rule be made absolute, and that the defendants in the rule pay *in solido* to the plaintiffs, Taylor, Knapp & Co., the sum of six hundred and thirty-one dollars and seventy-eight cents, with interest at eight per cent. per annum, from the 30th of March, 1858, till paid, and costs of suit in both courts.

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No. 111.—LEVY & DIETER v. M. BAER.

Defendant executed two promissory notes for \$4,000 each, dated February 1860, secured by special mortgage on real estate in Shreveport; W. A. Violet & Co., of New Orleans, afterwards became the holders of these notes. In the month of December, 1865, defendant drew two drafts, for the amount of the two notes and interest, in favor of W. A. Violet & Co., on Messrs. Levy & Dieter, with stipulation in the drafts, that on payment they would become subrogated to all the rights and privileges of W. A. Violet & Co. to the two mortgage notes held by them. The drafts were accepted and paid at the time fixed, 18th of March, 1866, and the mortgage notes delivered to them: *Held*—That, by the holders of the notes, W. A. Violet & Co., endorsing on the back "received payment as stated," they adopted all the conditions in the drafts, as much as if they had repeated the expression of subrogation in the receipt, and that a complete subrogation took place at the time of payment.

Damages cannot be allowed defendant, as attorney's fees, where the judgment is in favor of plaintiff.

**A** PPEAL from the District Court, Parish of Caddo, *Weems, J.*  
*Land & Land*, for plaintiffs. *Looney & Wells*, for defendant.

LABAUVE, J. On the 15th of February, 1860, the defendant executed his two promissory notes in favor of Autrer, Harrison & Co., each for \$4,000, with eight per cent. interest, from maturity, payable, respectively, eleven and thirteen months after date, and secured by a mortgage on certain property in Shreveport, Louisiana, with a stipulation in the act of mortgage, that the debtor should pay three per cent. as attorney's fees in case executory proceedings should be resorted to for payment. The notes were endorsed in blank by the payees, one to Violet & Co., and the other, to the Union Bank; Violet, afterwards became holder of both notes.

On the 4th December, 1865, M. Baer, the maker, drew a draft for each of said notes, in favor of said Violet & Co., the holders, on the plaintiffs Levy & Dieter; both drafts being of the same tenor, accept as to amount and time of payment, as follows:

"\$5,497 95.

NEW ORLEANS, Dec. 4th, 1865.

On or before the 18th day of March next, fixed, pay to the order of Messrs. W. A. Violet & Co., five thousand four hundred and ninety-seven dollars, and ninety-five cents, which will subrogate you to all the rights and privileges of the said W. A. Violet & Co., in and to a certain mortgage note drawn by me, for four thousand dollars, with eight per cent. per annum interest, from maturity until paid, bearing date, New Orleans, 15th February, 1860, and payable thirteen months thereafter, which they now hold, and which will be surrendered to you at the time of the above payment. It is distinctly understood that the above arrangement is not made in *novation* of the last-described paper, but *it* is to remain in full force until paid off by me, whether it be held by the said W. A. Violet

Levy &amp; Dieter v. M. Baer.

& Co., in default of payment of the above amount or transferred by them, to the acceptors of this instrument, in consideration of payment of the same."

(Signed)

"M. BAER."

"To Messrs. Levy & Dieter, New Orleans."

Both of said drafts were paid by the drawers to the payees, and a receipt of the following tenor, is entered on the back of each of them, as follows:

"Received payment of Messrs. Levy & Dieter, January 18th, 1866."

(Signed)

"W. A. VIOLETT &amp; Co."

The two mortgage notes were delivered to the plaintiffs and exceptors, at the time of payment.

The plaintiffs in injunction, then sued out an order of seizure and sale, which was granted on the grounds:

That he never made in favor of Levy & Dieter any act of mortgage whatever, and that said Levy & Dieter have no mortgage enabling them legally to procure and execute executory process of said Court, they having no mortgage in their favor, and no authentic evidence that they are the owners of any such mortgage; that the granting of three per cent. for attorney's fees, is illegal, etc. He claims damages for attorney's fees, and also general damages.

The executory proceedings were changed into the *via ordinaria*.

The District Court gave judgment in favor of plaintiffs, for the amount of the notes and interest, and recognized the special mortgage to secure the payment of said debt, interest and costs, including three per cent. for attorney's fees. The Court also gave judgment in favor of defendant against plaintiffs, for \$500, as damages for attorney's fees. The defendant appealed.

The plaintiffs have asked in this Court that the judgment be amended, by rejecting that part of the clause allowing \$500 to the defendant.

The main question presented is, whether or not, the plaintiffs, on paying the said drafts were subrogated to the creditor's mortgage securing the payment of said notes, as required by Art. 2156, No. 1, Civil Code, reading thus:

"When the creditor, receiving his payment from a third person subrogates him in his rights, actions, privileges and mortgages against the debtor, this subrogation must be expressed and made at the same time as the payment."

It is contended by defendants' counsel, that there is no *express subrogation*, and that the receipt goes no further than to acknowledge that the drafts have been paid.

The parties to these drafts are M. Baer, the drawer, W. A. Violett & Co., the payees and holders, and Levy & Dieter, the acceptors.

We view and consider these drafts as agreements entered into by all these parties, stipulating that on payment of said drafts, the plaintiffs and acceptors were to be subrogated to the rights and mortgage existing in favor of the payees and holders of the mortgage notes, who, by receiving payment as stated on the back of said drafts, adopted virtually all the clauses and conditions stipulated in the said drafts, as much so as if they had repeated the expression of subrogation in the receipt. The subrogation was conditioned upon the payment of the drafts, and, there-

*Hynson v. Texada.*

fore, took place by and at the time of payment. The evidence shows that the notes were delivered to the plaintiffs. We are of opinion that the article of the Code was complied with, and that the plaintiffs were duly subrogated.

As to the allowance of \$500 in favor of defendants as damages for attorney's fees, we know of no law authorizing it, and the judgment must be amended in that respect; otherwise, we are of opinion that the judgment is correct.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be so amended as to strike out that part of the decree allowing the defendant \$500 as damages for attorney's fees; and it is further ordered, that the judgment as amended be affirmed, at the costs of the appellant, M. Baer.

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No. 88.—R. C. HYNSON *v.* THOMAS J. TEXADA.

The answers of defendant to interrogatories propounded by plaintiff, can only be destroyed by the oath of two witnesses, or one witness corroborated by strong circumstantial evidence, or by written proof. C. P., Art. 354.

**A** PPEAL from the District Court, Parish of Rapides, *Cooley, J.*  
*Lewis & Hunter*, for plaintiff. *Ryan & White*, for defendant.

**LABAUVE, J.** The plaintiff, as transferee of Rhorer & Zunts, claims of the defendant the sum of \$1,258 12, with interest. The defendant pleaded the general issue and prescription of three years. This suit is brought on an open account for plantation supplies, moneys, etc., commencing on the 27th February, 1861, and ending 24th February, 1862.

Judgment was rendered in favor of plaintiff, and the defendant appealed.

The plaintiff propounded the following interrogatories to the defendant:

1. Did you order and receive any of the articles mentioned in the account upon which suit is brought?

2. Examine the account herewith filed, and state whether the items are correctly charged, and if not, which are correct and which are incorrect.

1st Int. Answer.—During the year 1861, I remember to have had no dealings with Rhorer & Zunts that were not settled by draft or note, and feel certain, from examination of memorandum in my possession, that I owe them nothing on an open account. I did order supplies for my plantation during that year, but they failed to furnish them; I was compelled to obtain them elsewhere, consequently I do not think that I received any of the articles charged in the account.

2d Int. Answer.—My first answer is responsive to this question; I am satisfied that none of the items are correctly charged as being due; one item of insurance on sugar-house, and another, on gin-house, are certainly incorrect; and so I regard each and every one."

It is clear that these answers negative the indebtedness of the defendant upon the account sued on.

The plaintiff has introduced letters of the defendant, to show that he had requested Rhorer & Zunts to send him articles charged in the account; such letters, although asking for the articles, do not prove that the demand was complied with, and do not contradict the answers of the



defendant. This is all the testimony in support of the account. The answers of the defendant cannot be destroyed, except by the oath of two witnesses, or of one single witness, corroborated by strong circumstantial evidence, or by written proof. C. P. Art. 354. Besides, we have been unable to find in the record a transfer by Rhorer & Zunts to the plaintiff.

We are of opinion that plaintiff has failed to make out his case.

The defendant has not called our attention to the plea of prescription; we have, therefore, not thought necessary to pass upon it.

It is therefore ordered and decreed, that the judgment appealed from be annulled and avoided; it is further ordered and decreed, that plaintiff's demand be dismissed as in a case of nonsuit, and that he pay costs in both courts.

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No. 102.—B. McFEELEY v. JOHN OSBORN et al.

The act of the Legislature, approved February 28th, 1866, prescribing the mode by which the records of the parish of Rapides, destroyed by fire in the year 1864, may be reinstated, does not permit the question of the invalidity of a judgment, the record of which has been destroyed, to be inquired into, in the suit for its restoration.

Only the question of fact, as to the existence of such judgment and its destruction, can be made the subject of examination in such suits. Session Acts, 1866, page 70.

**A**PPEAL from the District Court, Parish of Rapides, *Lewis, J.*  
*Lewis & Hunter*, for plaintiff. *J. Orsborn*, for defendants.

**TALIAFERRO, J.** The defendants appeal from a judgment rendered by the District Court, decreeing the restoration of a judgment alleged to have been obtained against them by the plaintiff at the October term of the Court, either in the year 1861 or the year 1862. The proceeding is taken in this case under an act of the Legislature, approved February 28th, 1866, prescribing the mode by which the records of the parish of Rapides, destroyed by fire in 1864, may be reinstated. The defendants answer the plaintiff's petition, by admitting that a judgment as set forth by the plaintiff was rendered against them at the October term, 1862, of the District Court of the Ninth Judicial District, but aver the invalidity and nullity of the judgment on several grounds.

We think the declaration, in the plaintiff's petition, supported by his affidavit, that such a judgment existed, and that it was destroyed by fire, coupled with the admission of the defendants, fully authorized the judgment of the Court. The act of the Legislature referred to, expressly limited the defendants to the simple issue of the previous existence or non-existence of the alleged judgment, and it was not admissible for them, in this case, to raise the question of its validity. The testimony shows that a District Court was held in the parish of Rapides, in the years 1861 and 1862, at the October term. The allegation of the plaintiff, under oath, is, that the judgment was rendered at either the October term, 1861 or 1862. The decree of the Court establishes that the judgment was rendered in 1861.

We see no objection to the judgment appealed from on this account, especially as the allegation of defendants, that the time of the rendition of the judgment sought to be restored, was October, 1862, is not supported by oath.

McFeeley v. Osborn et al.

There is no force in the exception, that the case was not decided in open Court.

The act of the Legislature, on the subject, expressly authorizes the Judge to decide such cases in Chambers.

It is therefore ordered, adjudged and decreed, that the judgment of District Court be affirmed, with costs in both courts.

No. 49.—JOHN BOGAN, Administrator, v. WILLIAM S. & MEREDITH CALHOUN.

Parol evidence is inadmissible to change the parties to a written instrument, by showing that the party who signed the note did so as the agent and surety for another, whose name does not appear on the note.

A promissory note, payable on time with interest, bears interest from date.

**A** PPEAL from the District Court, Parish of Rapides, *Lewis, J.*  
*M. Ryan and H. S. Losee*, for plaintiff. *T. C. Manning*, for defendant.

**LABAUVE, J.** The petition alleges that William Smith Calhoun and his father, Meredith Calhoun, are indebted *in solido* to the plaintiff, in the sum of \$8,302 50, upon a note of the following tenor:

“ALEXANDRIA, LA., January 17th, 1861.

\$8,302 50. In twelve months, I promise to pay to the order of John Bogan, Sr., the sum of eight thousand three hundred and two dollars and fifty cents, for value received, bearing eight per cent. per annum interest.” (Signed) “WILLIAM SMITH CALHOUN.”

Judgment was rendered against William Smith Calhoun alone in favor of plaintiff, and against plaintiff in favor of Meredith Calhoun, as in a case of nonsuit. The plaintiff appealed.

The case was taken up on a default, defendant having failed to answer.

On trial plaintiff offered to prove, by competent witnesses, that Meredith Calhoun was really the borrower of the money, and that William S. Calhoun acted as his agent as well as surety. The Court *ex propria motu* refused to admit the testimony, on the grounds that the note is not signed by Calhoun, as an agent, etc.

We are clearly of opinion that the Court did not err. Had the evidence offered been received, it would have changed and disnatured the note sued upon by parol evidence (C. C., Art. 2256) so much so that the maker, who is a simple debtor on the face of the note, would have been changed into a surety and agent, and another debtor substituted in his stead; the defendants having made default, the Court was bound to receive only legal testimony. 10 A. 766.

William S. Calhoun, the appellee, prays that the judgment be amended by allowing interest only from the time the note became due. It has been decided by this Court, that a note payable on time, with interest, bears interest from date, because the stipulation of interest is not made in default of payment; it is presumed that the maker intended to pay the note when due; and had he done so, could he have said: I owe but the principal? We think not.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, and that the plaintiff and appellant pay costs of appeal.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
NEW ORLEANS.

NOVEMBER, 1867.

JUDGES OF THE COURT.

Hon. Wm. B. HYMAN, *Chief Justice.*

Hon. ZENON LABAUVE,  
Hon. J. H. ILSLEY,  
Hon. R. K. HOWELL,  
Hon. J. G. TALIAFERRO. } *Associate Justices.*

No. 1039.—MRS. MARY LUZENBERG v. A. P. CLEVELAND.

Where the holder of a promissory note permits a payment to be endorsed on the note in Confederate treasury notes, (an unlawful issue) Courts will not interfere, but will leave the parties where their conduct has placed them.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*Geo. L. Bright*, for plaintiff and appellee. *Lacey & Marks*, for defendant and appellant.

**ILSLEY, J.** This is an action to recover the sum of *four thousand seven hundred and five dollars and seven cents* and interest in current notes, the amount of a promissory note, drawn by the defendant to the order of the plaintiff.

The defendant, for answer, says that the note was given to the plaintiff for and in consideration, and to cover an equal amount of Confederate

Luzenberg v. Cleveland.

bills belonging to the said plaintiff, and which she turned over to him, and that there was no other consideration for the said note.

This defence is not sustained, for, in her answers to interrogatories on facts and articles the plaintiff, in substance, says, that the defendant held for her two notes, each for five thousand dollars, which he caused to be discounted, but that she never authorized the defendant to receive as the proceeds thereof Confederate money, nor did she know that he had received such money. That the amount of the note sued on, resulting from the proceeds of said discounted notes, were in his hands unaccounted for, and that she permitted him to use it, taking for it the defendant's note.

From this statement of the transaction, it is perfectly immaterial what the defendant received as the proceeds of the two notes, each for \$5,000. If he took Confederate money for them, and returned a part of it as the consideration of the note now in suit, he has no cause for complaint, as he was bound to account for the amount of the discounted notes in current funds, and he cannot maintain against the plaintiff the defence he now seeks to set up.

There is a credit on the note of two thousand dollars, endorsed on the note on the 23d November, 1863, in Confederate notes; and the plaintiff, in her answer, says that she did not take these notes as an equivalent for that amount in currency of the city of New Orleans, which was worth at the time ten times more than Confederate notes. Be this as it may, the plaintiff permitted a payment of two thousand dollars to be endorsed on the note, and this Court will not inquire into a transaction in regard to Confederate notes—an unlawful issue, in which, she admits, she freely entered and voluntarily participated. In such cases, Courts leave parties where their own conduct has placed them.

It is therefore ordered that the judgment of the District Court be reversed, cancelled and annulled; and it is ordered, adjudged and decreed that judgment be and it is hereby rendered in favor of the plaintiff and against the defendant, for the sum of four thousand seven hundred and five dollars and seven cents, with interest, at the rate of five per cent per annum, from the eleventh of May, 1863, the said amount to be credited with two thousand dollars, endorsed on the note as paid on the 23d November, 1863; the costs of the lower Court to be paid by the appellant, and those of the appeal by the appellee.

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No. 247.—STATE OF LOUISIANA v. LOUISIANA MUTUAL INSURANCE CO.

By an act of the Legislature, approved March 15th, 1855, to regulate corporations generally, the officers of each insurance company are required to publish annually a full statement under oath of the business of the company, etc.; and, on the estimate thus made and published, the assessor is authorized to make his assessment for the year.

A party objecting to the assessment roll on the ground that it is incorrect, must resort to the mode pointed out by law, and within the time prescribed, to have it corrected; otherwise, he will be bound by it.

Where the tax-payer omits to furnish the assessor with a statement of his property taxed in the manner and within the time prescribed by law, the assessor is authorized and required to make the assessment from the best information he can obtain.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
*T. J. Semmes, Attorney-General, for State. Race, Foster & E. T. Mer-*  
*rick, for defendants and appellants.*

HOWELL, J. The State claims the sum of \$2,524 20, as the tax legally assessed, for the year 1859, on the capital stock of the defendant, amounting to \$865,435, and not exempted from taxation by its charter.

The defence is, that the capital amounts only to \$573,500, of which the sum of \$149,436 68 is invested in real estate, otherwise taxed, and stocks not subject to taxation, leaving the amount of \$424,063 32, on which the company is, and has always been, willing to pay the State tax.

From the evidence in the record, it appears that the assessor did not include in his estimate the amount invested in real estate, and bonds claimed in the answer to be exempt from taxation as capital, and the only question is, whether or not the amount of the capital was properly fixed by the assessor.

The revenue law, in force in 1859, (see Acts 1855, p. 509, § 31) made it the duty of an officer of the company to furnish the assessor, on or before the 1st day of March each year, a statement under oath, specifying the real estate owned by the company, the capital stock actually paid in and not vested in real estate, and the place in which it is liable to be taxed. By another section (34) of said law, the assessor is authorized, in case of failure to get the list required of tax-payers, to make the assessment according to his own knowledge, and the best information he can obtain.

By section 4, of "an act to regulate corporations generally," approved 15th March, 1855, (Session Acts, p. 486) the officers of each insurance company are required to publish annually a full statement under oath of the business of the company, which shall contain the amount of premiums received during the previous year, the amount of losses sustained, and the amount of capital, stating the portion of the same invested in securities, and the nature thereof.

In conformity with this law, and its charter (as represented) the defendant published a statement on 16th March, 1859, for the year ending 28th February, 1859, showing the assets to be \$997,227 02, from which it appears the assessor made the assessment in question.

The District Judge held the company liable for the tax on the sum thus ascertained by the assessor, and referred to two cases reported in 8 N. S. pp. 629, 680, as defining what constitutes capital, viz: "That which the company uses to accomplish the purpose for which it was formed."

Under the circumstances, we think the Judge did not err. The assessor, not having been furnished with the statement required, on or before the 1st March, pursued the mode above indicated to ascertain the capital of the company. The 37th section of the revenue act provides the manner in which errors in assessments may be corrected, and, the defendants, not having followed that course, it requires something more than we find in the record to be relieved of the assessment, which seems to have been made as directed by law.

The secretary of the company testifies that he addressed a communication on 28th June, 1859, to the assessor, setting forth the capital of the company subject to taxation on the 1st May, 1859, as shown by the books and balance sheet of that date, and consisting of "*scrip certificates for profits*," which, after corrections made by him on the witness stand, fixed the capital at \$476,500. But the assessor did not adopt this statement in



place of the estimate and assessment already made by him, and we see no reason why we should.

The charter of the company is not before us, and we are not informed why these "scrip certificates for profits" should any more constitute the entire capital of the company than the items taken by the assessor from the sworn published statement of the company, made at the time and in the manner prescribed by law, and which it is presumed afforded the best information the assessor could obtain for making the assessment.

It will be observed that the law requires the assessor to make the assessment "according to his own knowledge, and the best information he can obtain in relation to it," in case the tax-payer does not furnish the statement within the time prescribed, and the evidence in this case does not show such error in the action of the assessor, as to authorize the intervention of the judicial power.

The defendant did not adopt the mode prescribed by law, to have the roll corrected, if erroneous.

Judgment affirmed, with costs.

*Petition for Rehearing.*—Counsel for appellants petition the Court for a rehearing in this case, from the conviction that there is error in the judgment of the Court, and trusting that a reconsideration of the case will lead to a different result.

In their brief, counsel failed, perhaps, to set forth clearly to the minds of the Court, the principles on which the business of mutual insurance companies is carried on.

As regards capital, the system of mutual insurance differs very materially from the old system of joint-stock insurance companies. The latter have a capital stock, the property of the various stockholders, which is increased by the current yearly profits of the business of the company, while under the mutual system of insurance, there is no joint-stock capital, and the business of the company is commenced without capital, and for a time carried on upon the pledges of its friends of future premiums.

The profits, resulting from the business of the company engaged in mutual insurance, belong to the various parties insured, and are returned to them in form of scrip certificates, which are from time to time redeemed by the company. The only capital which the mutual insurance company possesses is the profits of the company, thus represented by scrip certificates issued to the various patrons or parties insured by the company.

By the charter of the Louisiana Mutual Insurance Company, the amount of scrip certificates, which alone constitutes the capital of the company, is fixed at five hundred thousand dollars; whenever the net profits exceed this sum of five hundred thousand dollars, the excess is employed from year to year in redeeming the scrip certificates issued, while new certificates are annually issued for the current net profits of the year. Charter, Art. 10.

The trustees of the company have never varied from the terms of the charter, and the net profits have annually been distributed to the parties insured in scrip certificates, and the capital kept, as nearly as practicable, at the amount fixed by the charter.

As, under the terms of the charter, certificates are not issued for fractions under ten dollars, it is impracticable to preserve the scrip capital always at any precise given point, but the charter has been the law of the trustees to guide them in their administration, and they have never materially departed therefrom.

In 1859 the capital was \$573,500, as shown by the sworn statement of the company, in accordance with the requirements of law, represented by the scrip certificates of 1858 and 1859.

Notwithstanding, that in the annual statement of the company, made March 1st, 1859, the *assets* figure up to a much higher amount, the *capital* of the company remains the same, and is not materially changed.

The *assets* may be increased, so may the liabilities, while the *capital* remains unchanged.

The lower Court erred in the confusion of terms, and considering *assets* and *capital* synonymous and convertible terms.

The authorities referred to by the lower Court, 8 N. S. 638 and 681, do not warrant the confusion of terms, nor support the conclusions of the Court.

The terms *assets* and *capital* are neither of them found in any part of the opinion of the Court in the latter case, and in both cases, the question is, whether the entire capital of the company, as fixed by their charter, is subject to taxation, though but a portion thereof has been paid in. The insurance company claimed, that as but one-tenth of their capital was paid in, it alone constituted their stock in trade, and was subject to taxation. The Court decided that their stock in trade was their capital, as fixed by their charter, and subject to taxation, whether paid in or only secured.

If these cases apply in any manner to the case at bar, the force of the decision is in favor of defendants, and goes to the effect that Courts will be governed by the capital fixed by the charter of the company.

We desire, particularly, to call the attention of the Court to the consideration of this point—the difference between the *assets* and the *capital* of the company—which has been overlooked by the assessors and the Judge of the lower Court, who, in his reasons for judgment, evidently confounds the terms, and we beg to refer the Court again to our brief already filed herein, pages 3, 4 and 5.

The assessor was furnished by the company a full statement of their affairs, by the sworn statement of March 1st, 1859, made and published in accordance with the requirements of law.

Nothing could be more full and explicit, nothing further could be required. He was in error in throwing this aside, and making up an amount suited to his own liking. We submit his error should be corrected, and the judgment of the lower Court reversed, and counsel, therefore, respectfully pray for a rehearing of the case.

Rehearing refused.

R. Means et al. v. Hyde &amp; Mackie.

## No. 736.—R. MEANS et al. v. HYDE &amp; MACKIE.

Where a party brings suit for the possession of property unlawfully taken away from him, with a claim for damages for such unlawful detention, the Court will restrict the judgment for damages to the amount actually proved.

**A**PPEAL from the Fourth District Court of New Orleans, *Thiard, J.*  
*J. Ad. Rozier*, for plaintiffs and appellees. *Buchanan & Gilmere*, for defendants and appellants.

**HOWELL, J.** Plaintiffs allege that they are the owners of three certain lots of ground in McDonoghville, parish of Orleans, right bank of the Mississippi river, having a front on said river of about 120 feet, on which they conducted the business of blacksmithing, the repairing and manufacturing of boilers, and speculating in wrecked and damaged vessels, and for which purpose they required the constant and uninterrupted use of their premises fronting on the river; that the defendants, a commercial firm, own property near theirs, separated therefrom by Market street, and have built on the whole width of said street a wharf, which (since September, 1860, and up to filing this suit, April 8th, 1861) covers a portion of plaintiffs' land, and is occupied by defendants, thus obstructing and interfering with plaintiffs' business, by which they have suffered damages to the amount of \$5,000. They pray, in general terms, for the possession of their property, and said amount as damages.

Defendants pleaded the general denial; judgment was rendered against them for the possession sought, and \$1,500 damages, and they appealed.

It is shown that in 1846 and 1849, plaintiffs bought three lots of ground, fronting on Market street, in McDonoghville, and that by the caving in of the bank, they eventually obtained along the side of their property an angular and oblique front on the river; that in 1860, defendants built a wharf at the end of and on Market street, for the purposes of their dry dock business, and in the progress thereof obstructed plaintiffs' business at times, by mooring vessels along their front; but the only instance in which actual damage is shown, the loss to plaintiffs amounted to \$100.

Several witnesses state that at different times defendants kept vessels moored along the front of plaintiffs' property, and that boats could not then approach plaintiffs' shop for repairs without moving said vessels, but they do not say that any boats made an effort, and were actually prevented from doing so, except in the instances above referred to. They state, besides, that plaintiffs themselves had vessels there during some of these occasions, and they do not distinguish between them, so as to enable the Court to determine the extent of the obstructions thus caused by defendants. And in addition to this, the data as to the amount of work, business or profits of which plaintiffs were deprived, if any, beyond what we have stated, are not furnished with any accuracy. The amounts mentioned by one or two witnesses are merely conjectural, and not such as to warrant an estimate for a judgment.

It is shown that the wharf erected by defendants encroaches, at one corner thereof, upon plaintiffs' land; but it is also shown, that the defen-

Domingo v. Merchants' Mutual Insurance Co.

dants were at one time about to remove that portion where plaintiffs objected; and it is shown that the latter have been in the habit of making use of the wharf. But, as they are not bound to allow this private wharf to remain permanently on their land, they have the right to have it removed, and the possession of that portion of land restored to them, upon giving reasonable notice, which it appears they have done.

It is therefore ordered, that the judgment appealed from be amended so as to reduce the amount of damages awarded from \$1,500 to \$100, and that as thus amended it be affirmed, defendants to pay the costs of the lower Court, and plaintiffs those of appeal.

Rehearing refused.

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**No. 1008.—JOSE DOMINGO v. THE MERCHANTS' MUTUAL INSURANCE CO.**

Where the Merchants' Mutual Insurance Company of New Orleans, having insured the steamship *Cornudella* to navigate the waters of the gulf between certain ports named in the policy, seek to avoid payment of the insurance, when the vessel has been lost by being wrecked on the bar, while attempting to enter one of the ports named, they must show by evidence that the loss occurred through the negligence and fault of the master of the vessel.

It is sufficient for the master to place the vessel in charge of a pilot familiar with the bar and channel, who has been in the habit of piloting sea-going vessels across the bar, where the contract shows no stipulation to the contrary.

**APPEAL** from the Third District Court of New Orleans, *Fellows, J.*  
*W. H. Hunt and T. L. Bayne*, for plaintiff and appellee. *A. & M. Voorhies*, for defendant and appellants.

*Brief of Wm. H. Hunt and Thos. L. Bayne, for plaintiff and appellee.*

\* \* \* But it is said that Cromer was taken aboard the *Cornudella* at New Orleans, and had not visited Bagdad for "four or six weeks previous" to the loss of the steamer. It is asked: "Taking this in connection with the shifting character of the quicksand bar and channel at the mouth of the Rio Grande, and with the well-established custom of bar pilots (whether regular pilots or captains of lighters) to sound constantly, daily, if possible, in order to keep the run of these changes, did not the assured commit a breach of warranty, in taking as pilot to cross the bar, a lighterman who had been so long absent?"

The answer to this inquiry is obvious. If the law or usage at Bagdad required a vessel about to cross the bar to take even a regularly licensed pilot offering himself, the master of the vessel would be compelled, according to this doctrine, to ascertain before he took him, whether such pilot had sounded the bar on that day or the day before, in order to come up to the standard of seaworthiness here contended for! Such a requirement would be unusual, and is not in accordance with any system of law. "If a person, representing himself and believed to be a qualified pilot, is taken, the warranty of seaworthiness is satisfied, though he is not in fact qualified." 1 Phil., § 714, p. 388. *Law v. Hollingsworth*, 7 T. R. 160.

It was enough for the assured to know that Cromer was familiar with the bar; that his reputation, as a pilot, was unexceptionable, and that he was in the constant habit of taking other vessels over the bar. The plaintiff had no right and no reason to believe, that if the bar required to be sounded before attempting to cross it, he would omit to perform his duty. Indeed the evidence of all the witnesses concurs in showing that Cromer, after first surveying the bar, took the correct channel over it, and that had he sounded for the channel he would not have run more directly through its centre.

But it is said that "the loss of the vessel was the result of stubborn mismanagement on the part of the master, thereby discharging the insurers from all liability." The only evidence referred to in proof of this ground of defence is that of James Hill. He seems, from his own account, to have boarded the steamer after she got aground, and to have been quite officious in at once volunteering advice as to the means of saving her. He recommended to the captain to engage an anchor and cable that were in the small boat on which he had come out to the steamer.

He is particular in the avowal of his disinterestedness, in giving this advice; and adds: "the boat and cable did not belong to me." "Capt. Sheldon positively refused, saying he could save the boat without it." He further told Capt. Sheldon "she must be rescued by anchors and ropes, and not by working her machinery. Capt. S. persisted in working the machinery."

Unfortunately for the defendant's case, the correctness of Hill's advice is not shown by the testimony of other witnesses; and the fact that the captain persisted in attempting to save her by means of working her machinery instead of by anchors and ropes, is not demonstrated to have been a mistake. The opinion of Hill seems to have been in opposition to that of the captain and pilot of the steamer; and there is nothing in the record to prove that Hill's method of saving her would have been more successful than theirs.

In conclusion, the plaintiff submits:

That the loss of the Cornudella, by an event within the policy of insurance, is shown by the evidence and admitted by the pleadings;

That the presumption of law is in favor of her seaworthiness. 2 Gren. Ev., § 401. Hen. Dig., p. 715, and the burthen of proof of unseaworthiness rests upon the defendants;

That the testimony shows that she was seaworthy, and that the proof of unseaworthiness has signally failed;

That the port of Bagdad was in no sense a well-appointed port; that lightermen were the most competent and experienced pilots, and were generally employed as such, even in preference to the two or three parties spoken of by a few witnesses as pilots, and who derived their pretended authority from irresponsible and irregular sources;

That the Cornudella, when lost, was in charge of a pilot of established reputation and entire competency; and

That every act was done by the master and crew of the vessel to avoid the disaster which befell her, and which resulted in a loss, now sought to be entailed entirely upon the plaintiff, in spite of the defendant's solemn contract of partial indemnity in the event of its occurrence.



HOWELL, J. This is an action on a policy of insurance taken out by plaintiff on a steamship, to run from New Orleans to the Rio Grande, and there navigate between Bagdad and Camargo; the defence to which is, that the "loss was caused by the master's failure to employ a pilot to navigate the vessel on coming upon pilotage ground, at the mouth of the Rio Grande, where custom and usage required said vessel to be so navigated; \* \* \* and that the doings and actings of the master and crew, at the time of, and after the loss, further occasioned said loss."

Judgment was rendered in favor of the plaintiff for the amount of the policy, and defendant appealed.

The evidence shows that the master of the steamship took on at New Orleans a pilot, who was a captain of a lighter used at, and was familiar with, the bar at the mouth of the Rio Grande, and who, upon arriving there, and after examination, informed the master that it was safe then to cross, although the water on the bar was quite rough; but after passing over the shoal portion of the bar, the vessel struck some hidden object in the channel, supposed to be an anchor or a sunken vessel, which broke one of the wheels, and caused the boat to sheer to the northward, and run on the bar on the Texas shore. In backing her off, the other wheel was also disabled, and she drifted seaward upon the bar, broadside to the channel, where she became a wreck.

It is contended that the custom required the vessel to be put under the charge of a *licensed* pilot in crossing the bar, and a large number of witnesses on each side were examined as to the existence of such a custom; but we think the preponderance of evidence is with plaintiff—that it is sufficient to place the vessel in charge of a pilot familiar with the bar and channel, and in the habit of piloting sea-going vessels across the bar, and that the person employed by the master was such a pilot. The argument, that it is necessary, from the shifting nature of the bar, for the pilot to examine it daily, and that the pilot on this boat had been absent a few weeks, does not seem to possess much force, as it appears that the vessel was steered in the right channel. It seems, also, that one of defendant's witnesses, who claims to be a *licensed* pilot, had his boat sunk in attempting to go out to plaintiff's steamer on the occasion.

It is by no means satisfactorily shown that Bagdad was a well-appointed port, with regular pilots commissioned by public authority.

It is said, by some of the witnesses, that there are some "licensed pilots" there, but the sources from which they obtained license, if it be in any manner a formal license, are vague and irregular. We are left to conjecture, in regard to the duties and authority of the captain of the port, and any established power to control the affairs of the port.

The evidence is insufficient to establish such a custom as the defence relies on, and which it was incumbent on them to prove. 2 Green. Ev., § 401.

When lost the boat was in charge of a pilot of established reputation and entire competency—one of that class to which it was customary to intrust vessels in crossing the bar at the Rio Grande, although there were some of this class, who seem to have been favored in some way by some of the

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various authorities, which existed from time to time in that and adjacent localities.

From the testimony of those who had the best opportunities of knowing, we think the master and crew did all in their power to avoid the loss.

Judgment affirmed, with costs.

Rehearing refused.

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No. 1003.—JOSE DOMINGO v. THE UNION INSURANCE COMPANY.

The doctrine in the case of Domingo v. Merchants' Mutual Insurance Company (ante page 479) reaffirmed.

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J. W. H. Hunt and T. L. Bayne*, for plaintiff and appellee. *Bradford, Lea & Finney*, for defendants and appellants.

HOWELL, J. The pleadings, evidence and points involved in this case are identical with those of the same plaintiff against the Merchants' Mutual Insurance Company, just decided, and for the reasons therein assigned the judgment is affirmed, with costs.

Rehearing refused.

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No. 1337.—P. H. MONSSEAUX et al. v. G. URQUHART et al.

Where the charter of an incorporated company has fixed the qualification of voters, by declaring that each share of stock shall be entitled to one vote, which may be cast by the stockholder in person or by proxy, any vote or votes cast by a party at any election of the corporation, without the qualifications named, is null and void, and the election will be declared and enforced without counting such votes.

The right of voting, conferred by the charter, is not to be tested by the mere ownership of stock, but the transfer of it must be patent on the stock-book.

Where stock of the company stands on the books in the name of an individual, as president, and has not been transferred by him on the books of the company, he has no right to vote on it, or for it, at any election.

Stock, or shares standing on the books of the company, in the name of the corporation itself, cannot be voted for by one of its officers.

An agent or mandatory, intrusted with the management and control of real estate here for his principal, who resided in one of the Northern States before and during the late war, was not absolved from his obligations to his principal by the breaking out of hostilities between the two sections of the country. The agency continued during the war, and his acts, as such, were binding on his principal.

The doctrine, that a state of war dissolves or suspends all commercial partnerships existing between citizens or subjects of the belligerents, does not apply to agents or agencies.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J. J. Livingston*, for plaintiffs and appellants. *Cyprien Dufour*, for defendants and appellees.

ISLEY, J. This is a proceeding by *quo warranto*, in which the plaintiffs, alleging themselves to have been duly elected directors of the Carondelet Canal and Navigation Company of New Orleans, contest the legality of the returns of the commissioners, by which the defendants appear to have been elected, and are accordingly acting as directors.

The grounds upon which the plaintiffs impeach the validity of the commissioners' returns are the following, to wit:

1. That Louis Gagnet was allowed to vote for the defendants on forty shares, which he had transferred to and which stood in the name of R. M. Davis, President.

2. That R. M. Davis, through his agent, P. H. Monsseaux, was denied the right to vote on these forty shares.

3. That J. Llambias, executor of F. Marquez, was denied in person, and through his agent, P. Saloy, the right of voting on twenty-five shares.

4. That L. Gagnet was admitted to vote on five shares, as agent of L. Surgi.

5. That P. H. Monsseaux was denied the right of voting on these five shares as agent of L. Surgi.

6. That L. Gagnet was allowed to vote as agent on twenty-five shares of A. McIntire, and on forty shares of A. Culbert.

I. The plaintiffs' first objection appears to us well founded.

By section 8 of the act incorporating the company (Sess. Acts 1857, p. 146) it is provided that "at all elections of directors, and at all other meetings of stockholders, each share of stock shall be entitled to one vote."

"The votes in all cases may be cast by the stockholders in person, or by proxy." And section 15 of the same act provides, that "no transfer of stock shall be binding on the company, until made in its stock-book, \* \* and no stockholder shall be permitted to vote at any meeting of the stockholders unless he became a stockholder on the books of the company at least thirty days previous to said meeting."

From these plain provisions of the act of incorporation, and from an inspection of the record, it is manifest that the votes of Louis Gagnet on the forty shares of stock registered in the stock-book in the name of R. M. Davis, President, should have been rejected. The right of voting, conferred by the charter, is not to be tested by the mere ownership of stock, but the transfer of it must be patent on the stock-book.

It is the registry which is the *sine qua non* for the right to vote on stock; and as these forty shares were not at the time of the election, duly registered in the name of Louis Gagnet, or in that of his principal, his vote on it cannot therefore be counted.

II. Was R. M. Davis properly denied the right to vote on these forty shares? It is not pretended that R. M. Davis, individually, was the registered transferee of these shares, nor that at the time of the election he was the president of the company. But, it is contended that inasmuch as the stock stood in the name of R. M. Davis, President, and had not been transferred by him, Davis only, whether president or not, had the right to vote on it.

This position, if correct, might give to one who had ceased to have any interest whatever in the affairs of the corporation, a controlling vote in its management. We would be loath to assent to the correctness of such a proposition, unless imperatively demanded by the express provisions of the law.

In support of their objection, the plaintiffs rely upon the case of the

*Mohawk and Hudson R. R. Co.*, 6 Cowen 135, the facts of which are as follows:

Certain shares of stock stood inscribed on the transfer-books of the company in the name of Samuel Jaudon, *cashier*.

Samuel Glover, under a proxy from Y. Cowperthwaite, *cashier* of Philadelphia, appointing him his substitute to vote, etc., and executed thus: "J. Cowperthwaite (L. S.) accompanied by an affidavit by the said Glover, that Cowperthwaite was the successor of Samuel Jaudon, as cashier of the United States Bank, attempted to vote on the shares standing in the name of Jaudon, cashier, but his vote was rejected.

The Court, independently of the glaring deficiencies of the instrument alleged to be a proxy of the United States Bank, held, that the adjunct cashier showed no trust in Jaudon, for any certain person—the bank of the United States not being named; that the trust was a matter between Jaudon and the bank, with which the corporation had nothing to do; that the addition of the word *cashier* was a mere description of the person, and that in view of the provisions of a special statute of the State of New York, the attempt to vote in the name of Cowperthwaite could not be sustained.

There is evidently a marked difference between the facts of that case and those of the one now under consideration. Jaudon was an officer of a corporation domiciled out of the State of New York, and the inspectors of election could not be expected to take notice *ex officio* of the fact that he had been cashier of the United States Bank of Philadelphia, and that the addition *cashier* to his name indicated that he held the stock as cashier of that particular bank. But we do not doubt that had Jaudon undertaken to vote on the strength of his nominal title, in opposition to the wishes or without the assent of the proper representatives of the United States Bank, that a Court of equity would readily have interfered, either to enjoin him from so doing or to defeat any legal object he might have sought to attain.

Here, the transfer by Gagnet of this stock on the stock-book, was properly made to its president. The designation of Davis as such on the books could not be treated as a mere *descriptio personæ*.

Neither the shareholders nor the commissioners were at liberty to disregard the official designation of the head officer of the company. Whatever, for instance, might have been said about a transfer to R. M. Davis, *treasurer* or *cashier*, he not being at the time treasurer or cashier of the company, could not apply to the present case.

The official designation of its chief officer could not be ignored by the other officers, or by the members of the company.

If R. M. Davis had undertaken, without the assent of the directors, to transfer the stock standing in his name as president, could the secretary of the company have honestly complied with a request to enter such a transfer on the books after Davis had ceased to be the president of the corporation? If not, what right has Davis to act so far as relates to voting, or to any other privilege attached to a title to stock, standing in the name of the president of the company, as if it were entirely under his control, when in truth and in fact, he had no title or claim whatever to it.

And here it may be asked, can stock, standing in the name of and for

the corporation itself, be voted upon by one of its officers, at his own discretion? On this point we adopt the opinion expressed in a New York case, in 5 Cowen, p. 434, *ex parte Holmes*, in which the Court said: "If there could be a vote at all upon such stock one would suppose that it must be by each stockholder of the company, and in proportion to his interest in it. This brings us to the important difficulty in the case, which is whether stock thus held can vote at all; and we think it is not to be considered as stock held by any one for the purpose of being voted upon. No doubt the company may, from necessity, as in this case, take their own stock in pledge or payment, and keep it outstanding in trustees to prevent its being merged, and convert it to their security. But it is not stock to be voted upon, within the meaning of the charter or the general act upon which we are proceeding.

It is not to be tolerated, that a company should procure stock in any shape, which its officers may wield to the purposes of an election, thus securing themselves against the possibility of removal.

Monseaux, therefore, as the proxy of Davis, had no right to vote on these forty shares.

The conclusion we have reached on the sixth objection, urged by the relators, dispenses us from passing upon the third, fourth and fifth objections, as in our opinion, these would not affect the decree we have to render.

VI. This sixth objection is, that Gagnet was allowed to vote as agent on twenty-two shares of A. McIntire, and on forty shares of A. Culbert.

It is urged that the signatures, both of the parties granting the proxies and of the attesting witnesses should have been proved, and that the testimony adduced by Gagnet is insufficient in law to establish the genuineness of the proxies which he produced on the trial.

It appears that ever since the year 1859, Gagnet has been voting on these proxies in behalf of McIntyre and Culbert.

Independently of the fact that he established the genuineness of the signature of McIntyre to the proxy purporting to be signed by the latter, as well as to the attestation of that purporting to emanate from Culbert, he shows that he has been in correspondence with those parties, and that they have apparently acquiesced in his acts for a number of years.

The proxies having been executed, one in Pennsylvania, the other in New York, the difficulty of securing the evidence called for by the plaintiffs in a proceeding conducted in so summary a manner as that resorted to in this case, would perhaps entitle the defendant to an abatement of the rigor of the rules applicable to ordinary cases.

But the presumption, arising from the length of time during which Gagnet has been acting as the agent of the two parties named, is such that, in the absence of any evidence whatever to disprove his agencies, the proof adduced by him must be deemed sufficient.

It is, however, confidently maintained by the plaintiffs, that Gagnet's agency, having been created prior to the late civil war, the occurrence of that war had the effect of dissolving his agency, inasmuch as his principals resided in the North. It is argued that war between two nations operating a dissolution—not a mere suspension—of all commercial partnerships between the residents of the one and those of the other belligerent



country, agencies or mandates must, under the same circumstances, be dissolved for like reason.

Conceding the application of the doctrine, with reference to commercial partnerships, to the belligerent parties in the late civil war, is it true that that war did have the effect of putting an end to the agency conferred upon an individual residing here by a party residing in one of the Northern States? We do not perceive any such analogy between commercial partnerships and agencies of the kind now under consideration, as to induce us to hold that war would, for the same reasons, put an end to both. The continuance of commercial partnership between residents of the belligerent countries would require or encourage active communication or locomotive intercourse between individuals of the belligerent States—intercourse inconsistent with actual hostility, and might foster the resources or increase the comforts of the army. But could, for instance, an agent intrusted with the management of the real estate here of his principal, residing in a country at war with this, be authorized to consider his agency at an end, and abandon the management of the property intrusted to him, on the pretence that the war had freed him from his obligation as agent? Such a doctrine can be sanctioned neither on principle nor authority.

In the case of *Conn v. Penn*, 1 Pet. C. C. Rep. p. 523, where an abatement of interest on certain debts during the wars of the revolution, and of 1812, was claimed on the ground that the creditors were subjects and residents of Great Britain, and that payment could not legally have been made to them, Judge Washington said: "This Court, finding itself unshackled with authorities is left to form its own opinion of this question upon general principles, and we feel no hesitation in deciding, that the mere circumstance of war existing between two nations, is not a sufficient reason for abating interest upon the debt due by the subjects of the one belligerent to those of the other. \* \* \*

A prohibition of all intercourse, with an enemy during the war, and the legal consequences resulting therefrom, as it respects debtors on either side, furnish a sound, if not in all instances, a just reason for the abatement of interest until the return of peace. As a general rule, it may be safely laid down that wherever the law prohibits the payment of the principal, interest, during the existence of the prohibition, is not demandable. \* \* \* But the rule can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a *known agent there* authorized to receive the debt, because the payment to such creditor or *his agent* could, in no respect, be construed into the violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal; if he should do so, the offence is imputable to him, and not to the person paying him the money.

The same Judge again recognized the right of the agent to act for his principal, though an alien enemy, in the case of *Denniston v. Imbie*, 3 Wash. C. C. Rep. page 396. And in the very case of *Griswold v. Waddington*, relied on by the plaintiff in support of a contrary doctrine, Chancellor Kent, at page 486, 16 Johns' Reports, quotes with approbation the

two cases just referred to, and admits that if a creditor, though a subject of the enemy, have a *known agent here*, the payment may be made to him, although the agent cannot lawfully remit the money to his principal.

It is clear then, from these authorities, that the agency of Gagnet was not, as supposed by counsel for the plaintiffs, dissolved, or even suspended by the occurrence of the late war.

We conclude then, that there was no error in allowing Gagnet to vote on the twenty shares of McIntire, and on the forty shares of Culbert.

The twenty-five votes of Llambias and five of Surgi, if conceded to the plaintiffs, would not affect our decision.

For, of the nine defendants, all received 1013 votes or more, except J. L. Gubernator, who only received 963.

Deduct from 1013 the forty shares on votes standing in the name of R. M. Davis, President, and illegally voted upon by Gagnet, and the five voted on by him for Surgi, there still remains for the defendants (Gubernator alone excepted) a total of 968 votes.

Seven of the defendants received 916 votes; one 913, and another, B. Saloy, 934.

Add to 916 the 25 votes claimed for Llambias and five for Surgi, we have a total of 946, which is insufficient to change the result as to eight of the plaintiffs. But the vote in favor of Gubernator, being reduced by our rulings to 923, and B. Saloy, having received the highest number of votes cast for any of the candidates except eight of the plaintiffs, should have been returned as duly elected.

It is therefore ordered, adjudged and decreed, that the judgment of the lower Court, in so far as relates to J. L. Gubernator, be reversed; he not having been elected one of the directors of the Carondelet Canal and Navigation Company of New Orleans at the election held in January last; that B. Saloy be recognized as having been duly elected at that date as director of said company, and entitled as such to the rights and privileges of the office; that the costs of these proceedings in this Court, and in the lower Court, be paid by J. L. Gubernator, in the proportion of one-ninth of the whole; that in other respects, the judgment of the lower Court be affirmed, the costs of appeal, exclusive of those decreed against Gubernator to be paid by the appellants, excepting B. Saloy, the costs of whose application are to be paid as aforesaid, by Gubernator.

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No. 1051.—D. G. THOMAS v. THOMPSON & BARNES.

Where defendants sold goods for account of plaintiff, and received in payment Confederate notes, without plaintiff's authorization to do so, they will be liable to him for the proceeds of the sale in legal currency.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier. J. J. H. New*, for plaintiff and appellee. *E. W. Huntington*, for defendants and appellants.

**LABAUVE, J.** The plaintiff claims of the defendants \$357 15, net proceeds of sales of butter as per account rendered 26th March, 1862.

The defendants pleaded the general issue. They admit that they

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received and sold for account of plaintiff sixteen tubs of butter, netting \$357 15, but that the sale was made for Confederate notes of the late so-called Confederate States of America, which at that time were current in this city, and that said notes were tendered by them in payment of a draft drawn on them by the plaintiff for the amount of said proceeds, and that they were refused, and that they have always been ready to settle with plaintiff, in manner and form as they have herein above alleged.

Judgment was rendered for plaintiff, and the defendants have appealed.

According to the settled jurisprudence of this State, in regard to Confederate notes, it is evident that the defendants, under their own allegations, admitting them to be true, are liable to the plaintiff.

Judgment affirmed, with costs.

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Nos. 1066 & 856.—SUCCESSION OF MRS. T. BACHEMIN.

Where a succession of the wife has been regularly opened and administered, and a tableau of distribution among the creditors and heirs has been filed and homologated, the heirs can only claim the residue after deducting the amount of the succession liabilities and expenses incurred in the administration.

If the heirs have a judgment for their paraphernal rights against the estate of their deceased mother, such judgment is subject to a reduction to the extent of the legitimate charges against the succession; and the administrator cannot be required to pay more.

**A** PPEAL from the Second District of New Orleans, *Thomas, J.*  
*J. J. E. Planchard*, for appellee. *E. Bermudez*, for appellant.

**ILSLEY, J.** With a view to coerce payment of the judgment obtained by the heirs of the deceased for the paraphernal rights of their mother, amounting to \$2,353 91, they have taken a rule on the administrator to show cause why execution should not issue against him therefor.

The defence by the administrator set up is, that after deducting from that sum the amount of the succession liabilities \$1,036 95, the balance remaining, increased by the share of the deceased in the community residue \$120 41, and so forming an aggregate of \$1,437 37, constitutes the only funds, which after the payment of certain charges there against, he is ready and willing to pay over to them.

By the tableau filed in the District Court, which, after due legal notice was regularly homologated, the succession of the deceased was charged with certain liabilities, such as the cost of a tomb for her, her funeral expenses and other items, for which the heirs now object to.

Their objection to these items as succession debts, which they evidently are, is clearly untenable; besides, as they merely opposed the tableau in one particular only, without in any manner contesting the correctness of these items as charged in the tableau, the decree of homologation thereof has closed the door against any objection which they now urge.

The heirs are entitled to nothing beyond the residue of their mother's succession, and the administrator cannot be required to pay more to them.

It is therefore ordered, adjudged and decreed, that the judgment of the lower Court be reversed; and it is further ordered, adjudged and

decreed, that the rule herein taken, on June 28th, 1866, be made so far absolute that the administrator be and he is hereby required to pay over to the plaintiffs therein, the said sum of fourteen hundred and thirty-seven dollars and thirty-seven cents, after deducting therefrom such costs and charges as have been incurred since the filing of the tableau of distribution, and that appellees pay costs in both courts.

No. 1032.—JACOB BURCKETT, Agent, *v.* WILLIAM HOPSON.—JOHN B. CHANDLER, Intervenor.

The answers of a party interrogated on facts and articles form a part of the pleadings, and make a part of the record, and either party may use them without formally introducing them in evidence. Where articles of merchandise have been sold for cash and delivered, but not paid for, and a third party has attached them in the hands of the purchaser, the vendor may have the attachment set aside, and recover back the goods, if he make demand and identify the object sold within eight days from the day of delivery. C. C. 3196.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.* *Breaux & Fenner*, for plaintiff and appellee. *Marr & Foute*, for intervenor and appellant.

**LABAUVE, J.** The plaintiff, claiming of the defendant, a non-resident, the sum of \$307 15, obtained a writ of attachment, under which certain goods and merchandise, and three bales of cotton, were attached as the property of the defendant. John B. Chandler was also made garnishee to the proceedings, and cited as such, and ordered to answer certain interrogatories annexed to the petition.

The said John B. Chandler came in Court as intervenor and third opponent, alleging, in substance, that the goods and merchandise attached had been sold by him to the defendant, to be paid for in cash, amounting to \$337 49; that said goods were delivered to the N. O., J. & G. N. R. R. Co., as carriers, within the last eight days, to wit: on the 12th January, 1866, to be conveyed to the defendant in the State of Mississippi, and that the same were seized in this case; that the price of said goods is still due and unpaid; that he has the privilege of the vendor on said goods, and the right to reclaim possession of them for indemnity. In a supplemental petition, the intervenor also alleged that the three bales of cotton attached were his property, and the defendant has no title whatever to the same. He prays accordingly.

The Court below, after hearing the parties, dismissed intervenor's demand and gave judgment for plaintiff, with privilege on the property attached.

The intervenor took this appeal.

The plaintiff annexed to his petition, and propounded the following interrogatories to the garnishee:

1st. Have you in your possession or under your control, or had you at the time of service of these interrogatories, or since, any moneys, goods, rights, credits or property of any kind belonging to W. Hopson, or in which he has an interest?

2d. Are you indebted, or were you at the time of service of these

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interrogatories, or since, indebted in any amount or on any account, to W. Hopson?

Does not the amount of said debt exceed three hundred and seven dollars and fifteen cents?

To which he answered as follows:

To the first interrogatory, respondent answers, 1st: to each and every clause of said interrogatory and part thereof, respondent answers, No.

To the second interrogatory respondent answers, to each and every part of this interrogatory, respondent answers, No. And here, respondent will state that the defendant, Hopson, has been indebted to him, respondent, since December, 1865, for goods and merchandise, and cash advanced, all of which was sold, and cash advanced, under the express understanding and stipulation that he (Hopson) should immediately pay for the same, and reimburse respondent in cash, or its equivalent in cotton; respondent refers to the account annexed, marked A, as part of his answer hereto.

On the 11th and 13th of January, 1866, in accordance with the agreement aforesaid, and failing to pay respondent in cash, Hopson sent to your respondent three bales of cotton, to be applied to the payment of his account in lieu of cash, as herein before stated and explained. And further, after deducting the fullest market value of said three bales of cotton, Hopson, the defendant, is now indebted unto respondent in a sum exceeding \$500, now due, and owing under the contract and agreement above set forth. Respondent states that these three bales of cotton were delivered by respondent to his factors, J. L. Lee & Co., for sale on his account, and were seized by the sheriff in said factors' hands, in the above case.

Account annexed—

|                                   |                 |
|-----------------------------------|-----------------|
| " W. Hopson, in account with..... | J. B. CHANDLER. |
| December 6—Invoice rendered.....  | \$1,099 73      |
| "    "    Cash.....               | 59 55           |
| "    19—Invoice rendered.....     | 90 05           |
| "    "    "    "    .....         | 6 17            |
|                                   | \$1,255 50      |
| December 6—By cash.....           | 200 00          |
|                                   | \$1,055 50      |

" By three bales of cotton, received January 11th and 13th."

The answers, by the garnishee to the interrogatories, have not been excepted to, nor were they offered in evidence, and the plaintiff contends that they are not before us as evidence. The answers of a party interrogated on facts and articles form a part of the pleadings, and make a part of the record, and either party may use them without formally introducing them in evidence. 5 N. S. 179. 9 R. 19. *Augustus Walker v. Etienne Oillavaso*, not yet reported. Chandler, garnishee and intervenor, claims the three bales of cotton as owner, and we are satisfied by his own answers to the interrogatories, that they belonged to the defendant, William Hopson, who had sent them to the intervenor to be sold on his account, and the proceeds to be placed to his credit; there was no price agreed on, and the cotton was not weighed; it remained at the risk of Hopson.



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C. C., Arts. 2414, 2434. If the cotton had been destroyed by fire, how could Hopson have claimed credit for the value; there was no price agreed on, and the weight was not known? It was not a *dation en payment* for any specific sum. At the foot of the account is the following memorandum:

"By three bales of cotton, received January 11th and 13th," no amount is carried out as a credit; it is clear that the credit to be given depended upon the sale yet to be made.

Had the intervenor claimed a privilege it would have presented another very different question; but he claims the ownership. We are of opinion that Hopson was owner of the cotton when it was attached.

As to the other goods and merchandise attached, we are of opinion, from the evidence, that the intervenor was the vendor, and had a privilege as such; and, that having identified the said goods, and claimed them within eight days of the delivery, he is legally entitled to claim them back in kind, under Article 3196 of Civil Code.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be amended as follows: That the attachment on the goods and merchandise (other than the three bales of cotton) be dissolved, and that said goods and merchandise be delivered back to the intervenor; that the judgment as amended be affirmed, the plaintiff and appellee to pay the costs of this appeal.

No. 1052.—PHILIP DEVOT & Co. v. E. MARX.

The prescription of one year, under Article 3301 of the C. C., does not apply in an action against a *negotiorum gestor* to enforce a quasi contract.

A new trial will not be granted on the ground of newly discovered evidence, when the alleged newly discovered evidence, if offered, would be inadmissible under the pleadings.

Where the Court below has exercised a sound, legal discretion in overruling a motion for a new trial the Supreme Court will not interfere.

A contract made in 1862, between French subjects residing in France, on the one side, and persons residing within the rebel lines, and within the limits of the insurrectionary States of the United States, on the other, was not a traffic between enemies forbidden by the law of nations, the President's proclamation or the acts of Congress.

The proclamation of the President of the United States, and the acts of Congress, approved July 13th, 1861, only interdicted and prohibited commercial intercourse as unlawful, between the inhabitants of the eleven States named on the one side, and the citizens of the rest of the United States, on the other side. 12 U. S. Statutes at Large, 1862.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.* *Buchanan & Gilmore*, for plaintiffs and appellees. *E. W. Huntington* and *W. H. Hunt*, for defendant and appellant.

**LSLEY, J.** The plaintiffs, residents of Havre, France, purchased through their agent, John Gauche, of New Orleans, at Woodville, Miss., from E. Marx & Co., 59 bales of cotton, and from M. Simon & Co., 10 bales.

These purchases were made in the latter part of March, 1862, and the invoices in evidence are dated the 1st April, 1862.

The weight of the 69 bales, thus purchased, was 30,027 pounds, and the cotton was paid for.

Marx & Co. stored this cotton in the warehouse of Jacob Shlessinger,

at Woodville, on the 1st April, 1862, and Marx & Co., by a letter dated 2d April, 1862, advised Gauche thereof.

Invoices of the 69 bales of cotton, thus stood in Woodville for the account of the plaintiffs, with proof of ownership annexed, were deposited in the archives of the French Consulate in New Orleans, on the 6th of April, 1862, and the French Consul certified the same to be French property.

This cotton remained stored in Schlessinger's warehouse until some time in the year 1863, when the defendants, acting as the self-constituted agents of the owners, removed the cotton from the warehouse to a plantation some three miles distant, belonging to one Netterville, where they remained for a period of time, which the evidence does not determine.

By a letter dated 26th July, 1864, the defendants informed Gauche that they still had control of the cotton at the place to which it had been removed, and Marx therein tells Gauche that he has an offer for the cotton of twenty-five cents a pound, in Louisiana State Bank notes, and advises Gauche to authorize him to accept the offer, as "I see no prospect of removing it."

The letter concludes by requesting Gauche to instruct the writer what he shall do.

Gauche gave no authority to sell the cotton, and heard no more of it till informed by one Leob, that Marx had sold the cotton.

In December, 1865, the defendant had an interview with Gauche in New Orleans, and informed him that he had sold the cotton in question, but did not say to whom, or the price he had received for it.

Marx, the defendant, was brought into Court by personal service of citation, on the 20th January, 1866.

The plaintiffs claim their cotton, 30,027 pounds, or its value, stated and proved to be worth fifty cents per pound, its value when the suit was brought.

The defence set up is, 1st: a general denial; 2d, a denial that plaintiffs were the owners of the cotton; and 3d, plaintiff could not legally acquire property within the rebel lines, on the 1st April, 1862, and upon these issues the case was tried in the Court below. After the cause had been submitted for decision, the defendant filed a plea of prescription of one year in bar of the action, which was properly overruled by the Court below, as the action is evidently against a *negotiorum gestor* in a quasi contract, and is governed by Article 3508, and not by Article 3501, C. C.

The District Court, having rendered judgment in favor of the plaintiffs for the value of the cotton as prayed for by them in the alternative, the defendant made an application for a new trial upon the ground of newly discovered evidence, which he based upon an affidavit extant upon the record.

This affidavit declares that defendant can prove by two witnesses, Leob and Stewart, that the cotton sued for by the plaintiff was in part destroyed while being hauled from Woodville to Netterville's, and that the only part of the same saved was thirteen bales, weighing 5,962 pounds, which was all that came into the possession of the defendant, and for which he can be held responsible. No such defence as this was pleaded in the defendants' answer; and a new trial will not be granted to prove what has not

been pleaded. *Landry v. Banquin*, 17 La. 84. *Cox v. Bethaney*, 10 La. 156.

Another ground was urged in support of the application for a new trial, to wit: that the judgment does not conform to the prayer of the plaintiffs' petition. It was proved on the trial, that the sixty-nine bales which the defendants had taken possession of, had been sold by him, and gone out of his hands. A judgment for the delivery of the cotton would, therefore, have been nugatory.

This Court will not interfere when, as in the present case, the Court below has exercised a sound, legal discretion, in overruling an application for a new trial. 6 An. 753. 2 An. 265. 10 Rob. 57.

The plaintiffs' title to and ownership of the cotton, its value when the suit was brought, and the defendants' liability to the plaintiffs for that value, are clearly established, unless when the plaintiffs purchased the cotton they were not in a condition legally to acquire property within the rebel lines. The argument of the plaintiffs on this plea, set up by the defendant, meets the concurrence of this Court. They say, "the plaintiffs, French subjects, residents in France, bought on the 1st of April, 1862, through their agent, John Gauche, a resident of New Orleans, from Marx & Co., and Simon & Co., residents of Woodville, Miss., sixty-nine bales of cotton, then being in Woodville.

Both Woodville and New Orleans were, on the 1st April, 1862, within the rebel lines. New Orleans was captured and occupied by the Federal forces on the 25th of April, 1862, and Woodville not until the end of the war, in March or April, 1865.

At the date of the purchase a state of war existed, but both buyer and seller were on the same side of the hostile lines. It was not a traffic between enemies forbidden by the law of nations, nor by the President's proclamations and the acts of Congress. There is no principle of the law of nations better settled, than that no traffic or commercial contract can lawfully subsist between the inhabitants of one or two belligerent States and those of the other, belligerent State. Kent's Commentaries, vol. 1, pp. 74, 77.

The doctrine, respecting the illegality of any commercial intercourse between two nations at war, was extensively received and settled in the leading case of *Griswold v. Waddington*, 15 and 16 Johnson's New York Reports. See also *Scholefield v. Eichelberger*, 7 Peters, 586. But this doctrine is not applicable to the contracts for the purchase of cotton involved in the present controversy. The proclamation of the President of the United States of the 16th of August, 1861, is the authentic and official guide for the ascertainment of the geographical lines which separated the hostile parties during the late civil war and rebellion.

In that proclamation, President Lincoln declares, in pursuance of the 5th section of an act of Congress, approved July 13th, 1861, (12th U. S. Statutes at Large) that the inhabitants of eleven States named, (including Mississippi and Louisiana) are in a state of insurrection against the United States, and that all commercial intercourse between those States and their inhabitants, on the one side, and the citizens of other States, and other parts of the United States, on the other side, is unlawful, and will

remain unlawful until such insurrection shall cease, or has been suppressed. 12th U. S. Stat. at Large, 1262.

The words of the act of Congress, referred to in this proclamation, are as follows:

"*And thereupon*" (the proclamation of the President) *all commercial intercourse between the same (the proclaimed States) and the citizens of the rest of the United States shall cease, and be unlawful, so long as such condition of hostility shall continue.*" The difference of expression between the act of Congress and the President's proclamation, is not material. Commercial intercourse between the citizens of Louisiana or resident citizens of France, on the one side, and citizens of Mississippi on the other, in the month of April, 1862, was, therefore, clearly not unlawful.

For the reasons by the District Court, and those now by us assigned, it is ordered, adjudged and decreed that the judgment of the District Court be and the same is hereby affirmed, at the costs of the appellant.

Rehearing refused.

Nos. 904 & 905.—SUCCESSION OF J. C. P. WEDERSTRANDT.

J. C. P. Wederstrandt owned a plantation in the parish of Plaquemines, La., which he left in charge of Pierre Cazenave, his agent and factor, and went to New York in 1863, where he died in the month of February, 1864. Previous to his death he made a will, wherein he appointed Pierre Cazenave (his agent) testamentary executor of his succession, who qualified as such on the 18th of March, 1864; prior to the time the executor qualified, a crop was planted, and in a growing condition under his direction as agent; the agent, on becoming the executor, continued the working of the crop through the season, with the full knowledge of the creditors and legatees: *Held*—That whatever the executor has necessarily paid out in carrying on the plantation should be allowed in the settlement of his accounts.

The fact that he did not call a meeting of the creditors under Article 1160, C. C., cannot throw upon him all the expenses incurred in good faith, and make him at the same time pay over the proceeds of the crop.

Where the executor of an estate has filed an account of his administration, and all the credits are admitted, and all the debits are denied, and the account appears to be fair and reasonable, the presumption is in favor of the executor, who is an officer of the Court, and positive and direct proof of every item is not required.

**A**PPEAL from the Second District Court of New Orleans, *Thomas, J. C. Roselius*, and *Budd & Lambert*, for executor. *Buchanan & Gilmore*, and *C. N. Morse*, for Mrs. Isaac E. Morse. *J. Ad. Rozier*, for Mrs. Johnson, Mrs. Smith, and Miss E. Boyce.

**HOWELL, J.** On the 18th of March, 1865, Pierre Cazenave, testamentary executor, filed a provisional account, to which various oppositions were made, and from a judgment disposing thereof an appeal has been taken by all the opponents except one, who asks its affirmance. Only such grounds of opposition will be examined as have been urged before us, according to the rules of this Court.

**I.** The accounts of disbursements and expenses in carrying on a large plantation, in the parish of Plaquemines, are opposed on the grounds that the executor was without legal warrant to work the said plantation, but he should have sold or rented the property.

The testator, it seems, left here in the spring of 1863, leaving Cazenave, his agent and factor, and died in New York 9th February, 1864, having made a will, appointing said Cazenave his executor.

The evidence does not show that the plantation could have been advantageously leased after the death of the owner. An application to rent it was made prior to that event, but Cazenave, the agent, being without authority, declined, and the applicant refused to wait until the authority could be obtained. The executor qualified on 19th March, 1864, at which time the plantation was under cultivation in accordance with the previous instructions and wishes of the owner, and with every prospect of realizing a large revenue.

It appeared then to be to the interest of the creditors and legatees that a crop should be made, and no objection seems to have been suggested until after the crop was materially damaged in the summer and fall. The parties now opposing had their remedy, but they chose to remain silent, and to acquiesce in the course pursued by the executor. The fact that he did not call a meeting of the creditors under Article 1160, C. C., cannot throw upon him all the expenses incurred in good faith, and make him at the same time pay over the proceeds of the crop. Whatever he has necessarily paid out in carrying on the plantation should be allowed. It is urged, however, that these disbursements have not been satisfactorily proven. All credits in the accounts are admitted, and all the debits denied. Under such a general objection, we think, that where the account appears to be fair and reasonable, the presumption is in favor of the executor, who is an officer of the Court, and that the positive and direct proof of every item is not required. The clerk of the executor testifies positively to the correctness of the accounts, in this instance, and we find in the record several orders of Courts, authorizing purchases and payments, and many vouchers sustaining various items, which, together are sufficient, in our opinion, to sustain said accounts, in the absence of specific oppositions. The items, \$1,807 88 and \$1,460 60, are properly allowed. The item of \$27,817 55, opposed in the same manner, is the total indebtedness of the deceased to his factor, Cazenave, "as per account current rendered," up to 1st March, 1864, and interest to date of filing the tableau, and is reduced by credits to \$7,381 56, balance due. In a letter written by the deceased on 18th November, 1863, he states his indebtedness to Cazenave, on 1st May preceding, to be about \$21,000, which, with other evidence, including memoranda of instructions and letters from deceased to Cazenave, and the rule relating to the "stated accounts" of commission merchants, will authorize the allowance of this balance. No special objection is made to any item in this account current, which is in evidence, and to the correctness of all the items of which the clerk testifies from personal knowledge.

II. The item of \$1,109 78, "due by Mr. and Mrs. Morse," was stricken out on the opposition of the said Mrs. Morse, based on the ground that she is a creditor instead of a debtor to the estate, and entitle to the money received by the executor from J. Grassin for rent, under the written consent of the deceased.

The item is composed of \$600, for two months' rent of house 157 Camp street; \$175 rent received from J. Grassin, and \$334 78, sundries furnished Mr. Morse and family.

The other opponents also object to this item, on the ground that it should be charged to the executor.



The written consent referred to, and dated in March, 1863, is to the effect that Mrs. Morse should occupy the residence of the deceased, and the rent of \$100 a month be considered an equivalent for the interest on his note for \$15,000 held by her. The interest is credited on the note up to 1st January, 1864, and Mrs. Morse, the holder, is credited in the tableau for the interest thereon from said date to filing the tableau in 1865. The rent claimed is for ten months, ending on 30th November, 1864, at \$60 per month; that is, for the period intervening between the death of the deceased and the sale of the said house.

The agreement, therefore, if of any binding effect, does not apply, and getting credit for the interest, there is no good reason why she should not pay the rent, which is claimed for a much less amount than stipulated in the written consent or agreement. As to the rent received from Grassin for store, the consent of the decedent was conditioned, that Mrs. Morse should credit the amount received on the said note held by her, which is not done, and she must, consequently, account for the same, the amount of which is not disputed.

We think, therefore, the probate Judge erred in striking these two sums from the account; but we agree with him as to the third item. The value of the articles furnished to Mr. and Mrs. Morse was compensated by the services rendered by Mr. Morse on the plantation. No objection was made to the proof of such services as an equivalent to the charge.

III. Opposition is made to a note for \$17,000, in favor of Bank of Louisiana, secured by mortgage on the residence in New Orleans, and held by Mrs. Morse, on the ground that she purchased the note for one-third of its amount, and being a universal legatee must be deemed a *negotiorum gestor* in the purchase, and not be permitted to benefit herself to the prejudice of her co-legatees. To this it is successfully replied, that without proof of an intention to act in such character, Mrs. Morse, although a legatee in a succession insolvent *ab initio*, must be viewed as any other purchaser of the note, and as much entitled to its payment as if the bank had given it to her. She obtained a valid title to it, and its appearance in the tableau is correct. The succession is credited with the price of the mortgaged property, and charged with the amount of this note, to be paid to Mrs. Morse, and the surplus of the price, thus balancing the entry, and showing the destination of the proceeds or price.

It is therefore ordered, that the judgment appealed from, be set aside, so far as it sustains the opposition of Mrs. Isaac E. Morse, and it is now ordered that her said opposition be so far maintained only as to strike from the "item due by Mr. and Mrs. Morse," the sum of \$334 78, "amount of bill of sundries delivered to them from Harlom plantation," and that as thus amended, the judgment be affirmed.

Costs of appeal to be paid by Mrs. I. E. Morse, appellee.

## No. 892.—MEEKINS, KELLY &amp; Co. v. THEIR CREDITORS.

The exercise by Congress of the constitutional power, vested in them to establish a uniform system of bankruptcy, repeals the insolvent laws of each particular State.

The United States bankrupt law does not, however, divest the State Courts of the jurisdiction necessary to the final administration of the estate of an insolvent who had made a surrender previous to its passage

**A** PPEAL from the Third District Court of New Orleans, *Fellowes, J. Buchanan & Gilmore*, for plaintiffs and appellees. *Whitaker & Fellowes*, for appellants.

**HAILEY, J.** This case presents the first application by this tribunal of the act of Congress, approved 2d March, 1867, entitled "an act to establish a uniform system of bankruptcy throughout the United States."

By the 50th section of that act, it is in force for certain purposes from the date of its approval.

The legal effect of this exercise by Congress of a power vested by the Constitution of the United States, is to repeal the insolvent laws of each particular State. *Sturges v. Crowninshield*, 4 Wheat. 122; *Clarke v. Rosemba*, 5 Rob. 27; *Beach v. Miller*, 15 An. 602. Story on the Constitution, § 1114.

And this well-settled doctrine received a legislative sanction in Louisiana by the act of the 27th March, 1843, to revive the insolvent laws of Louisiana, an act passed immediately after the repeal by Congress of the United States Bankrupt Act of 1841.

Has this Court jurisdiction to decree, as it is asked to do by the appellant, that this cause be remanded to be proceeded with as a *cessio bonorum*, notwithstanding the repeal of the State insolvent laws?

The proceeding in the lower Court commenced by an application on the part of the plaintiffs, Meekins, Kelly & Co. for a respite, and the present appeal is taken by an opposing creditor from a judgment of the District Court, rendered in January, 1866, granting the respite.

An examination of the vote given at the meeting of creditors, and a comparison of that vote and the schedule filed, have failed to satisfy us that there has been a legal majority in favor of the respite, and the proceedings resolved themselves instantaneously into a *cessio bonorum*, which was accepted; and the acceptance of the cession vested all the property of the debtors in their creditors, and proceedings continue as if the cession had been offered in the first instance. Art. 3065, La. Code. *Arceaux v. His Creditors*, 3 La., p. 38.

In the case of *West v. His Creditors*, 5 Rob. 261, the doctrine is clearly announced, that the State tribunals were not deprived by the United States Bankrupt Law of any portion of their jurisdiction, necessary to the final administration of the estate of insolvents who had made a surrender previous to its passage, and we consider this the settled jurisprudence of the State. 8 Rob. 123. 4 An. 490. 15 An. 602. And that it is as applicable to the United States' Bankrupt Act of 1867 as to that of 1841, to which last act of Congress the decisions refer.

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It is therefore, for the reasons assigned, ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; it is further ordered, that the case be remanded, and that proceedings therein continue as if the cession had been offered in the first instance by the plaintiffs, costs in both courts to be paid by the insolvent estate.

Rehearing refused.

No. 1311.—STEPHEN WINDHAM v. DAVID CERF.

Courts of justice will not lend assistance to enforce or annul contracts when the consideration is illegal and reprobated by law.

**A** PPEAL from the District Court, Parish of East Feliciana, *Posey, J. J. McVea and J. H. Muse*, for plaintiff. *Breaux & Fenner*, and *W. F. Kernan*, for defendant.

HYMAN, C. J. Plaintiff sued to have the sale of a tract of land, made by him to defendant, in 1865, annulled, on the ground of lesion.

Defendant raised several grounds of objection to the suit, which we do not notice, as the plaintiff, in his petition, made an averment that deprives him of the aid of the Court in his attempt to set aside the sale. The averment is, that he received from the defendant as the consideration of the sale, the sum of ten thousand dollars in Confederate money, then greatly depreciated.

The plaintiff, by so contracting, gave confidence and credit to written obligations issued and used by rebels in carrying on war against the government.

The fact that he did not receive a sufficient consideration for the land sold by him to defendant, does not make the contract of sale any the less illegal.

This Court will not lend assistance, either to enforce or annul such contracts.

Let the judgment of the District Court be reversed, and the suit be dismissed at plaintiff's costs.

No. 1443½.—ALBERT A. PRAY v. FRANK HERBER & H. BLAESE.

Where a written obligation for money expresses a condition precedent to its payment, and the party on whom the condition is imposed, seeks to avoid payment on the ground of its failure, he must state that the failure was not through his fault or negligence.

**A** PPEAL from the Sixth District Court of New Orleans, *Howell, J. E. W. Huntington*, for plaintiff and appellee. *G. L. Bright*, for defendants and appellants.

HYMAN, C. J. This is a suit against defendants on a promissory note, drawn by Herber to the order of and endorsed by Blaese, payable on condition that Herber should be able to renew a lease of the "Wood

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House," in New Orleans, for two years. The defence is, the failure to obtain a renewal of the lease. The evidence shows that Herber could have obtained from the owner of the house a renewal of the lease for two years, for the price at which it had been rented. He chose not to do so, but required a reduction of the price.

Defendants have appealed from a judgment, condemning them to pay the amount of the note, interest thereon, and the cost of suit.

Let the judgment be affirmed, at the costs of defendants.

HOWELL, J., recused.

No. 909.—SUCCESSION OF W. G. STEPHENS.

The jurisdiction of the Second District Court of New Orleans, over the persons and property of minors, whose parents had died within its limits, and to whom it had appointed a tutor, who has since died, is not divested by the removal of the minors to another State.

Where minors have removed to another State, after the death of their tutor in this State, and guardians have been appointed thereto by competent judicial authority, such appointments will not be recognized by the Probate Court of this State having jurisdiction of the minor's property. They must qualify as tutors to the minors, according to the laws of this State, before they can sue for or obtain possession of the property of the minors.

**A** PPEAL from the Second District Court of New Orleans, *Thomas, J. Durant & Hornor*, for appellant.

**LABAUVE, J.** This is an appeal taken from a judgment of the lower Court, refusing to recognize the petitioners as guardians, respectively, of Geo. W. Stephens, aged about nineteen years, and Catherine Stephens, a girl aged about twelve years. This is an *ex parte* application, which was passed upon by the Judge on the face of the petition and letters of guardianship issued out of this State.

The petition reads thus:

"The petition of Meloin Stephens, who resides in the State of New York, and of Susan M. Hawley, a single woman, who resides in Tecumseth, in the State of Michigan, respectfully shows that William G. Stephens, a resident of this city, died on the 25th of November, 1861, and his succession was opened on the 10th of December, 1861, under No. 18,595 of the docket; that Gideon Stephens was appointed and qualified administrator thereof, and the proceedings still pending, and the succession unliquidated and unsettled; that at the time of his death, Wm. G. Stephens was a widower, having been twice married, first to Catherine Hawley, of the State of New York, and recently to \_\_\_\_\_ of the city of New Orleans, and by his first marriage, the said Stephens had two children, a boy named Geo. W. Stephens, now aged about nineteen years, and a girl named Catherine Stephens, now aged about twelve years; that these minors were, upon consultation with and consent of the relations of the deceased, and for the advantage and benefit of the said minors, taken from the city of New Orleans; and the boy, George, domiciled in the family of Nathan Stephens, in New York, where he still is, and the girl, Catherine Stephens, domiciliated in Tecumseth, Michigan, where she still is:

"The said Nathan Stephens, being the brother of the deceased, and the said Susan M. Hawley, the sister of the first wife, and maternal aunt of Catherine, her ward; and that this removal of the minors was effected in the month of June, 1862; that these minors are the sole heirs of the deceased, the issue of the first marriage, and there was no issue of the second marriage; that on the 25th of April, 1864, Gideon Stephens, administrator, and the father of the deceased, convoked a meeting of the family, under whose recommendation the Court appointed by virtue of the fourth section of the act of 15th March, 1855, M. H. Flanagan, tutor, and Thomas H. Burke, under-tutor, who were both regularly qualified; that subsequently, to wit: on the ——— 1864, the said Flanagan died, and these minors have been left without a tutor ever since that date in Louisiana.

"Petitioners show that to obviate these embarrassments in the settlement of this succession, one of them, to wit: Melven Stephens has obtained letters of guardianship for the minor, George W. Stephens, from the Surrogate of King's county, New York, under date of the 26th December, 1865, and petitioner, Susan M. Hawley, obtained letters of guardianship for the minor, Catherine, from the Probate Court for the county of Jackson, both of which are made part hereof, from which it appears that both petitioners have been duly appointed and qualified according to the laws of the State where the appointments were made, and where the minors reside.

"Wherefore, petitioners pray that they be recognized as guardians of the said minors, and as such, entitled to sue for and recover any property, rights or credits belonging to the said minors in this State, and relieved from the necessity of qualifying as tutors of said minors, according to the laws of this State, and they pray for general relief."

At the foot of the petition, all the facts and allegations contained in said petition, are sworn to by one of the petitioners.

The letters of guardianship are found in the record, and show the appointments of tutors as made, respectively, in the States of New York and Michigan.

The Court below rendered judgment that the prayer of the petition be not granted.

The petitioners appealed.

This case involves a question of jurisdiction, which must be tested by fixing the domicile of the minors.

It is well settled that the domicile of the tutor is that of the minor. Civil Code, Art. 48. 2 R. 160. 14 A. 565. W. G. Stephens, the father of the minors, was a resident of and died in the city of New Orleans, on the 25th November, 1861, and his succession opened on the 10th December, 1861; he left at his death the said minors, to whom M. H. Flanagan was duly appointed and qualified as tutor, and he subsequently died in 1864, and the minors remained without a tutor. The petitioners subsequently caused themselves to be respectively appointed in the States of New York and Michigan.

These minors were removed from this State by their relations in June, 1864.

It is clear that the domicile of their father and of their deceased tutor,



Flanagan, was in this city, where they were left unprovided with tutor, by the death of Flanagan. Their domicile was then here, and the question is: did their removal from this State, change and remove also their domicile, and divest the Court of New Orleans of its jurisdiction over their persons and property? We think not: the tutorship was opened and vacated here, where their tutor resided at the time of his death, and no Courts, even in this State, had jurisdiction to fill the vacancy, except the probate Court of New Orleans. 13 A. 265. C. C., Art. 289. The appointments of petitioners are nullities.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, with costs.

No. 1433.—THE STATE, ex rel., KEARNY, BLOIS & Co., v. THE JUDGE OF THE SECOND DISTRICT COURT OF NEW ORLEANS, et al.

This case involves only a question of fact.

**A** PPEAL from the Second District Court of New Orleans, *Thomas, J. G. L. Bright*, for Kearny, Blois & Co.

*Reporter.*—The facts are stated in the opinion of the Court.

HOWELL, J. This is an application for a writ of prohibition against the Judge of the Second District Court of New Orleans, and the plaintiff, in the suit of *Alfred Penn v. Kearny, Blois & Co.*, in which a suspensive appeal was granted to the defendants, on furnishing a bond with good and solvent security, in the sum of \$13,000.

On a rule taken by the plaintiff to set aside the appeal, on the ground of the insufficiency of the sureties, the appeal was declared to be devolutive only, and to correct this alleged error of the District Judge, and prevent the issuing of an execution on the judgment, this proceeding is had.

The question presented to us is one of fact only, which is: Does the evidence show the sureties to be sufficient and solvent?

The first surety, James O. Nixon, states, that after paying all his debts there would be a sufficient amount of his property left to pay the amount of this bond. He estimates his debts at about \$130,000, and his assets at \$295,000; and yet the District Judge considered him to be an insufficient surety for \$13,000. Where such disparity exists, there must be grave reasons for doubting the surety.

The estimate of his property, as witness on the 8th June, 1867, is made as follows: He supposes that a certain piece of real estate, on Canal street, purchased by him for \$575, would bring \$10,000, on which there is a mortgage for \$5,300; the materials of the Crescent office cost about \$70,000; the "good will" of said office would sell for \$75,000; the State owes him about \$80,000; nearly all of which is in warrants, the most of which are pledged; and book accounts due him to about \$60,000, making in all the said sum of \$295,000, being \$165,000 more than his debts. Counsel for Penn contends that these estimates are palpably exaggerated and absurd, and refers to the suit of *J. O. Nixon v. His Creditors*, as

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rebutting evidence, in which his assets on 22d August, 1865, are placed in the schedule at \$282,981 29, and his liabilities at \$88,193 56, showing an excess in favor of the insolvent of \$194,787 73.

We are to determine whether or not the surety has property now sufficient to answer for the amount of the obligation. He says that he owes \$130,000, which must be considered good against him; that there is owing to him \$140,000; and besides this, he has the materials of the Crescent office, which cost him about \$70,000, and which we must presume he acquired since his surrender, in 1865. These sums, without including the "good will" of the Crescent office, \$75,000, and the real estate, \$10,000, make \$210,000 of assets to answer for \$130,000 of debts, leaving a margin of \$80,000.

We have nothing before us to show that the materials are not worth what they cost, nor that the debts due the witness may not be realized. We would be left to conjecture altogether in an attempt to fix any less value than that given by the witness, and we do not feel authorized to enter the fields of conjecture. It may be that his ideas of his own fortune are greater than the reality, but we are not furnished with the standard by which to measure the difference, the ideal and real fortune. We must be guided by the law and the evidence. It is true, the record of insolvency shows a very large excess of assets over liabilities, but an inspection of the schedule shows that said assets consist principally of accounts and notes for their full amount, the aggregate being over \$80,000, and due in a period of time extending back several years prior to June, 1862, and two claims for damages amounting to \$150,000, growing out of the alleged suppression and sale of the Crescent newspaper, at about the last mentioned date. The record of insolvency does not enable us to determine how much the witness exaggerates the value of his present property, if it is exaggerated, and being of a date prior to the making of the bond, cannot affect it.

There is no other rebutting evidence. If it be true, that J. O. Nixon is the State Printer, we do not see how that fact will protect him, as suggested, from the effect of his pledge of the State warrants, and which, if made available, will, to that extent, diminish his debts, for which they are pledged. There is no evidence as to the value of the said warrants.

Upon the whole, we are forced to the conclusion that the witness has shown that he has sufficient property, movable and immovable, after paying his debts, to satisfy the bond of \$13,000, and that there is not sufficient evidence in this record to discredit him as to that fact.

We think also, that the second surety, John Murphy, has shown property worth at least \$2,500 to answer, to that amount for said bond, and strengthen the security.

It is therefore ordered that the rule herein be made absolute, and that the Judge of the Second District Court of New Orleans, and Alfred Penn, be prohibited from proceeding further, in the case of *Penn v. Kearny, Blois & Co.*, during the pendency of the suspensive appeal therein. The defendants herein to pay the costs of this proceeding.

## No. 823.—H. BELLOCQ v. A. DHONES AND A. PENENT.

Plaintiff sues defendant for a settlement of the partnership account, and for damages against the managing partner. A third party intervenes, and claims a schooner as his own property, which he had purchased from the defendant, the managing partner, by notarial act, prior to the institution of the suit. Plaintiff resists his demand on the grounds, 1st: that the act of sale was not recorded, as required by acts of Congress; 2d, that it is not expressed on the face of the act of sale that he acted for himself and partners; 3d, that the price was not a good one, and the purchaser had notice of the claims of the other partners. The notarial act of sale, which informed the intervenor of the interest of plaintiffs, also informed him that the legal title was in defendant, and that the defendants have full authority to sell the vessel: *Held*—That, under the terms of this agreement and authority, the transfer of the schooner, by defendant to intervenor, of the legal title, carried with it the equitable title also.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier, J.* *G. Schmidt*, for plaintiff. *C. W. Hornor*, for intervenor. *Paul Morphy*, for curator *ad hoc*.

**HOWELL, J.** This is a suit to dissolve a partnership, sell and distribute the proceeds of a vessel belonging to the partnership, and to recover damages from the managing partner for negligence, unskillfulness, etc. One of the defendants, A. Penent, joins the plaintiff in his demand. The other is represented by a curator *ad hoc*.

The only question before us is raised on the intervention of Christoval Espinola, who claims the vessel as owner, by purchase for a valuable consideration from the defendant, A. Dhones, as sole owner, and having the right to sell.

By a notarial act between the parties, Dhones, Bellocq and Penent, it is declared, that they are the joint owners of the schooner *Glacier*, bought and registered in the name of A. Dhones, who is appointed master, and vested with authority to sell, at his discretion, for "a good price." On the 9th of August, 1864, he sold to the intervenor, by act, acknowledged before J. M. Day, Notary, and on the next day this suit was filed, and the schooner sequestered. Plaintiff, who alone complains of the judgment, contends that the title of the intervenor is not good, because it was not recorded as required by act of Congress, July 29th, 1850, (Stat. at Large, vol. 9, p. 440;) because there was no delivery; because it is not expressed on the face of the act of sale, that Dhones acted for himself and his partners; because the price was not a good one; and because the purchaser had notice of the claims of the other partners.

We consider it necessary to examine the third and last grounds only, which may be thus stated:

The intervenor, having knowledge through his agent, that Bellocq & Penent were partners, the act of sale to him by Dhones, in whom the legal title existed, should have expressed that he acted under his mandate in selling their interest.

The rule invoked by plaintiff is undoubtedly correct: "Nothing is better settled than the rule, that the purchaser with notice of a trust stands in no better situation than the seller, and it is equally settled that notice to the agent is notice to the principal."

But this rule, as quoted by plaintiff, appears in a dissenting opinion, and was not considered by a majority of the Supreme Court of the

United States, to apply to the case decided, which on this point is quite similar to the one now before us. See 2 Black., page 372. The notarial act which informed intervenor of the interest of Bellocq & Penent, also informed that the legal title was in Dhones, and that the latter had full authority to sell the vessel. Under the peculiar terms of this agreement and authority, the transfer by Dhones of the legal title carried with it, in our opinion, the equitable title. The proof adduced by plaintiff of knowledge in the intervenor of his rights, is also proof of his authorization to transfer those rights, which were carried in the name of the transferrer.

The evidence does not satisfy us, that the District Judge erred. It is therefore ordered that the judgment be affirmed, with costs. Rehearing refused.

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No. 1041.—MARY J. O'GARA v. SUCCESSION OF J. L. RIDDELL, deceased.

No greater alimony will be granted a bastard child than is shown to be necessary for its support. Should a larger sum become necessary, it is within the province of the Probate Court to grant it.

**A** PPEAL from Second District Court New Orleans, *Théard*, acting J. *E. Filleul*, for plaintiff and appellee. *Carleton Hunt* and *R. Hunt*, for appellant.

**HOWELL, J.** This is a suit for alimony on behalf of an adulterous bastard, in which the only question presented is the amount which should be allowed—the right to alimony being admitted.

After hearing evidence, the District Judge gave judgment, fixing the alimony at \$40 per month, to be paid to plaintiff as tutrix of her child, until the further order of the Court; from which the representatives of the deceased have appealed. They contend that by law, an adulterous bastard is entitled to mere alimony, and that a monthly allowance of \$25 per month, as fixed by a written agreement between the deceased and plaintiff, is sufficient and liberal, considering the condition of the parties respectively.

It is shown that the plaintiff is a seamstress, and very needy, and her child young and delicate; that the deceased left a widow and eight legitimate children, and an estate in this city worth over \$130,000, and that about a month or two before his death, in October, 1865, he entered into a written agreement with plaintiff, who then had two children, aged, respectively, twenty-four and nine months, to pay twenty-five dollars per month for each, payable quarterly in advance, until they obtained the age of twenty-one years.

One witness says, that considering the condition in life of the defendant, fifty dollars per month would not be too much.

Another, who is the sister of the widow, says that twenty-five dollars a month is quite sufficient, and that it does not cost her fifty dollars per month to support her own three children.

By alimony is meant what is necessary for the nourishment, lodging and support of the person claiming it, and in the case of a minor, it



includes education. It is to be granted in proportion to the wants of the person requiring it, and the circumstances of those who are to pay it, C. C., Arts. 246, 247.

We think that the weight of evidence and the considerations of the law make the smaller amount the proper sum to be allowed. If the sister of the widow can support three children on fifty dollars per month, certainly this child can be supported on the monthly allowance of twenty-five dollars. Should a larger sum become necessary, it will be within the power of the parties and the province of the probate Court to grant it.

It is therefore ordered, that the judgment be so amended as to reduce the monthly alimony from forty to twenty-five dollars, and as thus amended it be affirmed, costs of appeal to be paid by plaintiff.

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No. 1049.—MARTHA EMILY MADDEN v. EDWARD N. FIELDING.

A judgment rendered without citation or appearance, and without any thing equivalent to citation or appearance, is utterly void, and imports such absolute nullity, that any one having the least interest in opposing its effects may have such nullity pronounced.

Where a Judge is to use his legal discretion upon a certain state of facts, he can only execute that discretion after those facts are judicially made known to him; that is, by legal proof.

In a suit for a divorce, an order giving alimony to plaintiff was granted *ex parte*, and without legal notice to the defendant, the husband of plaintiff, and without any proof of the facts, the judicial knowledge of which was essential to the exercise of a sound, legal discretion: Held—That the order would work an irreparable injury to the defendant.

**A** PPEAL from Third District Court New Orleans, Duplantier, acting J. Waller H. Rogers, for plaintiff and appellee. J. P. Hornor, for defendant and appellant.

ISLEY, J. This is an appeal from an *interlocutory* order, granted by the Court below, in the proceeding instituted therein, by the plaintiff against the defendant, her husband, for a divorce, *a vinculo matrimonii*.

The original petition was filed in the lower Court on the 30th April, 1866, and in this petition no citation seemed to have been issued, nor process thereof ever served upon the plaintiff.

On the 21st July, 1866, the plaintiff filed a supplemental petition, which, with a citation, but without any copy of the original petition, was served on the defendant on the 23d July, 1866.

In this supplemental petition the plaintiff alleges, that the clerk had neglected to include in the order granted upon her original petition certain things for which she had prayed, and which she again asks for, and upon this supplemental petition, unsupported by any proof, the Court rendered an *ex parte* order, decreeing the plaintiff as the wife of the defendant, the care and custody of their minor children, and condemning the defendant to pay to the plaintiff a monthly alimony of one hundred dollars, commencing 1st April, 1866. This order was signed on the 21st July, 1866, and became an *interlocutory* judgment against the defendant.

It is contended by the defendant that the order appealed from, summarily separating his children from him, and condemning him to pay a large alimony, rendered *ex parte*, before he had judicial notice of the plaintiff's proceedings, the original and most important of which he still remains judicially ignorant of, was illegal and improvident, and should be rescinded.



By the 5th section of an "act relative to divorce," approved March 14th, 1855, page 377, it is enacted: "That the action for divorce shall be accompanied with the same provisional proceedings to which a suit for separation of bed and board may give rise, and agreeably to the Arts. 144, 145, 146, 147 and 148 of the Civil Code."

Now, by Article 144 of the Civil Code, it is provided: "If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the husband, whether plaintiff or defendant, unless there are strong reasons to deprive him of it, either in whole or in part, the decision whereof is left to the discretion of the Judge."

And by Article 146, C. C., it is provided: "If the wife has not a sufficient income for her maintenance during the suit for separation, the Judge shall allow her a sum for her support, proportioned to the means of the husband." So that, under these Articles of the Civil Code, 144 and 146, the question arises, whether the husband, who has the first legal right to claim the provisional keeping of his children whilst the suit lasts, *unless there are strong reasons to deprive him of it*, either in whole or in part, and who is only bound to furnish alimony to his wife during the pendency of the suit for divorce, *if his wife has not a sufficient income for her maintenance, and then only in proportion to his means*, is to be affected by an *ex parte* decree, and without any opportunity being granted him to assert his legal rights, and to make his defence on these important matters, and that, too, without any proof of the facts upon which the discretion of the Judge is to be exercised.

To state this proposition, is to decide it. In *Bernard v. Vignaud*, 1 N. S. 9, this Court said: "To condemn, without first hearing a defendant, or giving him an opportunity to be heard, is contrary to all principles of equity and law. Therefore, a judgment rendered against a person without citing him in the ordinary manner, without his appearing, or anything deemed equivalent to citation, or appearance, is utterly void, and imports such absolute nullity, that any one the least interested in opposing its effects, may have such nullity pronounced." 6 L. 577, and 9 An. 496; and in *Fletcher v. Henley*, 13 An. 151, which was a case similar in one particular, as to alimony, to the one now under consideration—this doctrine was recognized and applied.

We hold that in all cases where the Judge is to use his legal discretion, in deciding upon a certain state of facts, he can only exercise that discretion, and decide after those facts are judicially made known to him; that is, by legal proof.

As the interlocutory order in this case was granted entirely *ex parte*, and without legal notice of the proceeding to obtain it having been communicated in any legal manner to the defendant, and without any proof of the facts, the judicial knowledge of which was essential to the exercise of a sound, legal discretion on the part of the Judge, and the order would work an irreparable injury to the defendant,

It is therefore ordered, adjudged and decreed, that the interlocutory order, signed by the Judge of the lower Court on the 21st July, 1866, be, and the same is hereby annulled and rescinded, at the costs of the appellee.

## No. 136.—FRANCIS L. COOK v. JOHN LARKIN.

Where a party has acquired a negotiable note after its maturity, he will be protected as an innocent holder, if the immediate holder who transferred it to him took the note by endorsement *bona fide* for value, before it was due.

The holder of a promissory note in good faith succeeds to all the rights of the endorser under whom he holds.

**A** PPEAL from the Fourth District Court of New Orleans, *Price, J.*  
C. E. Schmidt, for plaintiff and appellant. A. Lothrop, for defendant and appellee.

HYMAN, C. J. Plaintiff sued defendant on his note of hand for \$500, dated February 16th, 1860, and payable five months after date to the order of Daniel R. Tight, by whom it was endorsed in blank.

Defendant, in answer, denied that there was consideration for the note, averring that it was obtained through fraud; denied that plaintiff was the owner thereof, and averred that if he was owner, he came into possession of it after maturity, out of the usual course of trade for an insufficient or no consideration, and under circumstances which debar him from recovering.

The case was tried by a jury, who rendered a verdict for defendant, and the Judge, in conformity with the verdict, gave judgment in favor of defendant, from which plaintiff has appealed.

We cannot concur with the verdict of the jury.

The evidence shows that Jean Lenettre purchased the note before its maturity, in good faith, and without notice of any equities against it, and that it belonged to him at its maturity.

Want of consideration could not have been effectually pleaded against Lenettre, neither can want of consideration be availably argued against plaintiff, without evidence showing want of good faith on his part. The evidence does not establish want of good faith in plaintiff.

Plaintiff, as the subsequent holder to Lenettre, was invested with all Lenettre's rights in the note. 12 An. 126, and authorities there cited.

It is decreed, that the judgment of the District Court be reversed; it is further decreed, that the plaintiff recover of the defendant the sum of five hundred dollars, with five per centum per annum interest thereon, from the 19th day of July, 1860, till paid, and the cost of suit.

## No. 1415.—SUCCESSION OF JANE MCCALL.

Where an order for a suspensive appeal, fixing the amount of the bond as the law directs, is granted from a judgment for twenty-nine hundred and fifteen dollars and ten cents, and the bond is given for five hundred dollars: *Held*—That neither a suspensive nor a devolutive appeal can be maintained.

To maintain an appeal as either devolutive or suspensive, the bond must be for the sum fixed by the Judge or by the law.

**A** PPEAL from the Second District Court of New Orleans, *Thomas, J.*  
Castera and Hunt, for appellant. Roselius & Philips, for appellees.

## Succession of McCall.

HOWELL, J. A motion is made to dismiss the appeal in this case, on the grounds, 1st, that the bond of appeal is not sufficient in amount; and 2d, that François Boisdoré, the appellant, is not a party to, and has no interest in, the judgment.

A judgment was rendered, homologating a final account filed by the heirs of P. Casenave, the deceased, administrator of the *Succession of Jane McCall*, by which the sum of \$1,943 40 was shown to be due to the heirs of the said Jane McCall. From this judgment of homologation, one François Boisdoré, alleging that he was aggrieved and injured thereby, was allowed a suspensive appeal, "on giving bond and security as the law directs." He furnished a bond and security in the sum of five hundred dollars, and on a rule taken by the agent of the heirs of McCall, the appeal was set aside, and from this judgment on the rule, a suspensive appeal was granted, upon "appellant's giving bond and security as required by law." He furnished another bond for five hundred dollars. It is this appeal which the appellees seek to dismiss.

The Judge, in granting a suspensive appeal, fixed the amount of the bond as the law fixed it, to wit: a sum exceeding by one-half the amount of the judgment, which is \$2,915 10 instead of \$500. The amount of the bond given is not sufficient. There is no order of the Judge stating \$500 as the amount of the surety to be given by the defendant, and the appeal cannot be maintained as a devolutive one. To maintain the appeal as either devolutive or suspensive, the bond must be for the sum fixed by the Judge or by the law. See case of *Deweese v. Storskr*, decision 29th April, 1867.

It is therefore ordered that the rule be made absolute, and the appeal dismissed, with costs.

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No. 89.—CHARLES CARPENTER, Curator, *v.* FEATHERSTON & AMIS.

During the existence of the community of acquets and gains, between T. L. King and his wife, he purchased immovable property, and put the same as stock into a partnership of which he became a member. After the dissolution of the community, by the death of Mrs. King, the property was sold on execution for the debts of the partnership; and the heirs of Mrs. King bring suit for her community interest therein: *Held*—That T. L. King, as the head and master of the community, had the right to put the acquets and gains as stock in the partnership; by so doing, it became the property of the partnership, and specially liable for its debts; and a forced sale thereof to pay them, divested whatever title the community had in said property.

**A** PPEAL from the District Court, Parish of Madison, *Farrar, J.*  
A. R. Hynes and C. T. Bemis, for plaintiff. Sparrow & Montgomery, and C. Roselius for defendants.

HYMAN, C. J. This suit was brought by the curator of the *Succession of Harriet King*, deceased, to have a partition made between her succession and Richard Featherston, and Junius Amis, of certain immovable property in the parish of Madison, and to recover a part of the revenues thereof.

Plaintiff claimed that her succession was part owner of the property, and was entitled to a part of its revenues, because it was acquired by Thompson L. King, while a community of acquets and gains existed between him and the deceased, the result of their marriage.

Carpenter, Curator, v. Featherston & Amis.

After suit was brought, the heirs of the deceased Mrs. King were made parties, and the suit was also revived against Henrietta Amis, as widow in community of Junius Amis, deceased, and as tutrix of his minor children, who called in warranty Samuel F. Butterworth.

Judgment was rendered on the 26th day of October, 1860, ordering that a partition of the property be made between plaintiff and defendants, decreeing that plaintiffs were part owners thereof, condemning defendants to pay part of its revenues to plaintiff, and rejecting the call in warranty against Butterworth.

From this judgment Mrs. Amis has appealed.

The evidence shows that Thompson L. King acquired, by purchase, during his marriage with Harriet King, an interest in the property in controversy, and that previous to the dissolution of the marriage he formed a contract of partnership with John E. Hunter, styled Hunter & King, put the property therein as stock of the partnership, and stipulated that the partnership should continue until the death of one of the partners.

After the dissolution of the marriage, by the death of Mrs. King, the partnership contracted debts, on which judgments were obtained against the partnership, and the property was sold to Collier, while the partnership existed, under executions issued to enforce the judgment.

Collier's right in the property was sold under executions to Featherston and Amis, and before the institution of the suit Featherston had sold his right therein, and by various transfers Junius Amis acquired whatever right Collier had in it, by the sale to him above mentioned.

Plaintiffs contend, that as there existed a community of acquets and gains between Thompson L. King and Harriet King, during their marriage, and as the property was acquired by purchase by T. L. King during the marriage, it became property in common between him and her succession, on the dissolution of the marriage by her death.

This position would be correct if T. L. King had not, while the marriage lasted, imposed an encumbrance on the property.

T. L. King was the head and master of the community of acquets and gains, and had the right to put the acquets and gains as stock in the partnership. See Civil Code, Art. 2373.

By his so doing, it became partnership property, and specially liable for the debts of the partnership, and a forced sale thereof to pay partnership debts divested whatever title the partnership or community had in the same.

The plaintiffs inherited the property, subject to the encumbrance put upon it by T. L. King.

It is ordered, adjudged and decreed, that the part of the judgment rejecting the call in warranty, be affirmed; it is further decreed, that the judgment of the District Court be, in every other respect, annulled, avoided and reversed; it is further decreed, that there be judgment in favor of the defendants, and against the plaintiffs. Plaintiffs to pay costs.

## No. 6901.—POLYCARPE FORTIER v. LEONCE BURTHE AND V. BURTHE et al.

Where a party sells a tract of land to another, with a stipulation in the act of sale, that the vendee is to have a right of way, and other servitudes belonging to the land, he cannot enforce the payment of the price until he has complied with that obligation.

Where a party, holding a mortgage importing a confession of judgment against the property of his debtor, resorts to the executory process to have the property seized and sold, he must bring himself within the strict requirements of the law.

Where the evidence shows that the party, in whose favor an order of seizure and sale has been rendered, is not entitled to the full amount for which it was granted, it will be set aside, and the injunction made perpetual.

**A**PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*  
*Randell Hunt and H. Dugué*, for plaintiff and appellee. *Durant & Hornor*, and *V. Burthe*, for defendants and appellants.

**HYMAN**, C. J. Defendants obtained an order of seizure and sale of certain lands in Burtheville, to enforce the payment of the unpaid part of the price, with interest thereon, for the sale of the land, and other rights and privileges made by them to plaintiff.

The sale of the land, under the order of seizure and sale, was inhibited by an injunction obtained by plaintiff, who averred, to procure it, that he purchased the land from the defendants as urban property, in Burtheville, with a stipulation that a plan made by Hedin, surveyor, should be amended by suppressing portions of certain streets running through it. That in and by the contract of sale he acquired a right of way over the streets exhibited on the plan as agreed to be amended, and particularly over Henry Clay Avenue and Levee street, by which the land sold to him was bounded; that defendants had refused to allow him to exercise his right of way, and had kept the streets closed; that defendants had, by keeping the streets closed, deprived him of the right of taking earth from one of the squares or islets of ground exhibited on the plan, and located between Levee and Nayades streets, they having expressly stipulated in the sale to grant him that privilege, and that they had lost the right of enforcing payment until they complied with these obligations, stipulated in the sale.

Defendants filed a general denial to plaintiff's allegations, and prayed that the injunction might be dissolved, with damages.

The District Court decreed, that the injunction should be maintained at defendants' costs; that the injunction should remain in force until defendants opened Henry Clay Avenue and Levee street, and allowed the plaintiff the enjoyment of servitude on the avenue, and until they amended the plan of Burtheville, in conformity with the judgment in case No. 11,889, and delivered to the plaintiff a plan of the land sold by them to him in Burtheville, according to the plan of Hedin, amended as agreed upon. It further decreed, that upon defendants' complying with the above conditions, they might be authorized to enforce their claim, except the interest that had accrued, and that they should be allowed interest only from the time of their compliance with the decree.

From this judgment defendants have appealed.

The evidence shows that the plaintiff bought the land ordered to be seized and sold, a servitude of right of way on Henry Clay Avenue, and



other rights and privileges from defendants, and agreed to pay for them in mass a certain sum.

It also discloses, that the defendants did not permit to plaintiff the right of way on the avenue, but kept it closed by fences, and that when plaintiff attempted to use his right, they, by process of Court, prevented him from using it, and so prevented him when the order of seizure and sale was obtained, and the injunction procured.

We have only stated these few facts out of the many proved, as they alone are sufficient for our decision.

The order of seizure and sale is a harsh remedy, and when a creditor obtains such order against his debtor's property, he should have so complied with his stipulations in the contract, on which he bases his claim, as to give him a right to pursue for the amount granted in the order.

It is apparent that the defendants are not entitled to the full amount, for which the order of seizure and sale was granted, until they permit the servitude of the right of way to be exercised by plaintiff, and comply with their other engagements in the contract of sale. The delivery of the land to plaintiff did not give them the right to claim the whole price, while the enjoyment of other property, which was one of the objects of the sale, and which formed a part of the price, is refused by them to him.

In 5th Annual, 578, where the facts were similar to those in this case, it was decided that a judgment arresting an order of seizure was not erroneous.

It is difficult to ascertain the reasons for that part of the decree of the lower Court, which deprives the defendants of all interest up to the time of their compliance with the preceding part of the decree.

The plaintiff, in his pleadings, has not asked that the defendants should be deprived of interest, and, until he does so, it will not be proper to decide how much interest defendants shall be deprived of by their non-compliance in part with their contract of sale.

The defendants objected to the admission of the evidence of Surveyor Williams, that the obstructions of defendants to plaintiff's enjoyment of some of the objects of the sale still existed.

Their objection was overruled by the Judge, and the evidence admitted.

They excepted to the ruling of the Judge, and filed their bill of exceptions.

Their objections to the admission of the evidence was, that the matters to which the evidence referred, had been settled between the parties in the decision in the case No. 11,889, which plaintiff may execute, and cannot abstain from so doing, and set up the same matters against the collection of their claim.

The decision in that suit was, that defendants should perform such of these obligations in the sale to plaintiff as they had not fulfilled.

We perceive no reason why plaintiff could not prove that defendants had not complied with their contract of sale, because a Court had ordered them to do what their contract bound them to do.

Let the judgment of the District Court be reversed, and let the injunction granted in this case be perpetuated; the cost of appeal to be borne by the plaintiff; those of the District Court, to be borne by defendants.

Rehearing refused.

## No. 1067.—W. C. GRAHAM v. JOHN O. NOBLE.

In order that a creditor may maintain a writ of arrest against his debtor, the creditor must swear that the debt or damages which he claims is really due to him, and the amount thereof, and that the debtor is about to remove from the State without leaving sufficient property in the State to pay his debt. He must, besides, execute his bond in favor of the debtor, in a sufficient amount to cover the damages, which he might sustain from the wrongful issuance of the writ of arrest. C. P., Art 214, and amendments.

The 3d section of the Act of the Legislature of 1855, (p. 42) placing resident and non-resident debtors on the same footing, as to the prerequisites for an arrest, is not repealed by the act of 1856, (p. 80) amending and re-enacting Art. 214 of the Code of Practice.

The Act of 1856, only prescribes an additional condition for the arrest of both resident and non-resident debtors.

**A**PPPEAL from the Third District Court of New Orleans, *Fellowes, J.*  
*Lacey & Marks*, for plaintiff and appellant. *Hays, Adams & Moise*,  
 for defendant and appellee.

**HOWELL, J.** The plaintiff has appealed from a judgment setting aside a writ of arrest, on a motion by defendant based on several grounds, only one of which we consider it necessary to examine, to wit: "Because it is not averred in the affidavit or petition, that the defendant has absconded from his place of residence" in another State. It is contended by counsel that the Act of 1856, (p. 80) amending and reenacting the 214th Art. C. P., repealed section 3 of Act 1855, (p. 42) requiring such fact to be sworn to, and placed resident and non-resident debtors on the same footing as to the prerequisites for an arrest.

We think this conclusion is not sustained by the letter of the law, or the rules of construction.

The act of 1856, is entitled "an act to amend and reenact article two hundred and fourteen of the Code of Practice," and contains only one section with two clauses. The first clause gives, with an unimportant verbal change, the Article 214 as amended by the act of 1840, (§ 2, p. 131) and the second clause requires a bond, with certain conditions, to be furnished by the plaintiff. The only material change made in said article, is the requiring of a bond as a prerequisite, in addition to the affidavit. There is no repealing clause or section in the act, and its provisions are not in any correct sense inconsistent or in conflict with the third section of the Act of 1855, entitled "An act relative to persons arrested and imprisoned for debt," but must be considered as prescribing an additional condition for the arrest of both resident and non-resident debtors, leaving the two affidavits still as conditions, respectively. The Act of 1855 expressly excepts, in its repealing section, what is contained in the Code of Practice on the same subject, which the Act of 1856 neither repeals nor conflicts with the provisions of the Code of Practice or the Act 1855, in this regard.

Judgment affirmed, with costs.

No. 907.—DOBBIN & Co. v. JOSEPH HEWETT.—W. McLOON, Intervenor.

A contract of mortgage that is valid by the law of the place where it is made, is valid everywhere.

A mortgage executed in the State of Maine, in accordance with the laws, on a brig or vessel, must be enforced in this State in accordance with the laws of the State of Maine.

By the law of the State of Maine, brigs and other vessels are personal property, and may be mortgaged, and the non-performance of the obligation for which the mortgage was given, operates an absolute transfer of the property mortgaged to the mortgagee.

Where a brig or other vessel has been mortgaged in the State of Maine, and afterwards arrives at the port of New Orleans, where she is attached by an ordinary creditor, and the mortgagee intervenes, and claims the ownership of the vessel by virtue of his mortgage, the attachment will be set aside, and the suit dismissed, and the mortgagee will be declared the owner.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
Charles B. Singleton, for intervenor and appellant. *Semmes & Mott*,  
for plaintiffs and appellees: Thomas Hunton, curator *ad hoc*, for defendant  
and appellee.

HYMAN, C. J. Plaintiffs brought suit in December, 1860, to recover of defendant the amount of a draft drawn in their favor, and accepted by him, and they also, by writ of attachment, caused the brig Henry Leeds to be attached as his property.

William McLoon intervened in the suit, and claimed to be owner of the brig.

Judgment was rendered in favor of plaintiffs for the amount claimed by them, with interest, sustaining the attachment of the brig, and decreeing that plaintiffs be paid, with privilege and preference from the proceeds of the sale thereof.

The judgment further decreed, that the intervenor recover \$2,500, with interest, and that he be paid as mortgagee out of the remains of the proceeds of the brig.

The intervenor has appealed from the judgment.

In November, 1859, the brig was mortgaged in the State of Maine by the defendant to the intervenor, to secure him against his acceptance of several drafts for the accommodation of the defendant.

The drafts were payable in three months from their date, and the intervenor paid them at their maturity.

By the laws of Maine, as proved by the testimony, brigs and other vessels are personal property, and may be mortgaged, and the consequence on the non-performance of an obligation for which a mortgage is given, is, that the property mortgaged becomes absolutely the property of the mortgagee without delivery, but liable to be redeemed within sixty days thereafter.

The obligation in the mortgage of the brig was for the defendant to hold the intervenor harmless from liability by the acceptance of the drafts, and it appears that the defendant has not complied with his obligation.

As it is not proved where the brig was when the mortgage was given, and as it is proved that she came to this State since the mortgage was contracted, the law of the place where the contract of mortgage was

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made, must govern. See the case of *P. R. Fell v. J. C. Davidson—Hicks & Co., Intervenor*, 17 An. 237.

The intervenor's title to the brig being perfect and complete by the laws of the State of Maine, before she was attached, the judgment of the District Court must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court, so far as it affects in any respect the intervenor, be annulled, avoided and reversed; it is further decreed, that the attachment on the brig Henry Leeds be dissolved. Let William McLoon be decreed owner of the brig Henry Leeds, and the plaintiffs pay the costs of the intervention, in both courts.

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*Petition for Rehearing, by Semmes & Mott for plaintiffs and appellees.*—The amount involved in this case is comparatively trifling, but the principles involved are of vast importance, and this consideration induces us to respectfully solicit the Court to revise the judgment it has rendered. We do so the more readily, as the decisions of the Supreme Court of Louisiana have ever been regarded and quoted as high authority, on questions involving a conflict of laws, and for that reason every decision on such questions should be well considered, regardless of the amount in controversy.

We consider the decision in this case erroneous, on two grounds:

1st. A correct principle of law has been applied, without regard, in our opinion, to the proper limitation of the principle.

2d. The Court has overlooked, as we respectfully suggest, an important point stated in the original brief, but not elaborated.

The Court uses the following language: "As it is not proved where the brig was when the mortgage was given, and as it is proved that she came to this State since the mortgage was contracted, the law of the place where the contract was made must govern."

We submit, with all due respect, that the *lex loci contractus*, in cases of mortgage, or any agreement creating liens, privileges or hypothecations, does not govern, so far as the mortgage, lien, hypothecation or privilege is concerned, unless the thing affected by such mortgage, lien, hypothecation or privilege, is at the time of contract within the territorial jurisdiction of the country where the contract was made. In other words, the contract of mortgage must be made, and the thing mortgaged must be, at the time of contract, within the same territorial jurisdiction. The only exception to this rule, that we know of, is where the property affected by the contract is afloat at sea at the time of contract; that is to say, beyond the jurisdiction of any other sovereign, in which event the *lex loci contractus* governs, as was properly decided in 17 An. 237, the case referred to by the Court.

The general rule, as to movables is, that the *lex loci contractus* governs, unless the movable at the time of contract is within the jurisdiction of another sovereign, whose laws are different from those of the place of contract. This principle was settled in the cases of *Olivier v. Townes*, 2 N. S. 93; 5 Martin, 23. 77, 78. 7 Martin, 318 and 353, and is approved by Story on Conflict of Laws, p. 384 and 391, 392.

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The vessel in this case, having been attached, it was the duty of the intervenor to prove all the facts necessary to the establishment of his adverse claim. He is plaintiff. Conceding the principle announced by the Court correct, coupled with the limitation we have suggested, the intervenor should have proved that the vessel at the date of the mortgage was within the jurisdiction of Maine or at sea. This he failed to do. He has proved what the laws of Maine are, but those laws do not govern, unless the vessel at the time of the mortgage was in Maine or at sea. Suppose at the time of this mortgage, she had been in Louisiana, and had remained there until the lapse of time required to convert the mortgage into an absolute transfer under the laws of Maine; it is clear, any creditor of the mortgagor could have seized the vessel under attachment against the mortgagor, and could have successfully maintained his seizure. Suppose, at the date of the mortgage, the vessel was in Baltimore, Philadelphia or New York; there being no proof of the laws governing mortgages in those States, the Court would presume they are similar to our own. A Baltimore, Philadelphia, or New York creditor could have seized. If such creditor could have seized, why could not a Louisiana creditor do so, after she came here from Baltimore, New York, or Philadelphia; or why could not the Baltimore, New York or Philadelphia creditor follow and attach here? It seems to us, therefore, that the Court cannot adhere to its decision, unless it considers the burden of proof on us, to show that the vessel at the date of the mortgage was not in the State of Maine, a proposition we deem untenable, as the intervenor is plaintiff, so far as we are concerned, and must prove his case affirmatively as well as all the facts necessary to a recovery.

2d. The Court has overlooked a point suggested in the original brief. It is this:

Admit that the laws of Maine govern; that by those laws the title of the mortgagee and intervenor became absolute after the expiration of the time limited in the mortgage; certainly, the mortgagee then stands in the relation of absolute vendee to the mortgagor, who becomes vendor. Now then, here is an absolute sale of personal property, not proved to be at sea at the time of sale, where the vendee allows the vendor to remain in possession for a year or more, without any effort to obtain possession.

Such possession by vendor in some States is conclusive evidence of fraud, and in all is presumptive evidence until rebutted. The laws of Maine, on this point, have not been proved. It is presumed, therefore, they are similar to ours. This argument takes for granted the doctrine answered by the Court, that the mortgage by operation of the laws of Maine, and by the expiration of the time limited in the mortgage, became an absolute sale. But what are the laws of Maine, in case of an absolute sale of a movable not accompanied by delivery? In point of fact we believe they are similar to our own; at all events there being no proof on that subject, the Court, on well-established principles, will assume them to be similar to our own. Now, in the case in 16 An. 284, *Central Bank v. McCloskey*, it was held, that mere consent vests the property in the obligee, yet this effect is strictly confined to the parties until actual delivery. The truth is, that is the law as to movables under every system of jurisprudence.



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The Court recognized the validity of the mortgage under the laws of Maine, on the principle of *lex loci*; under our laws such an instrument would be a nullity, as between the parties even. We now say, concede the decision on that point to be correct, yet the validity of the transfer, as to third persons before delivery, cannot be maintained, because there is no proof that the laws of Maine are different from our own, and in fact they are not. At the Common Law, a sale of a ship at sea even, is not valid as to third persons, if the vendee unreasonably delays to take possession after arrival. 8 Mass. 286. 9 Pick. 4. 2 Mat. 350.

In this case the vendee (for the mortgagee by the laws of Maine became vendee after the expiration of the time limited in the mortgage) permits the vendor to remain in possession more than a year after his title became absolute, and enables him to roam from port to port in the United States, and contract debts as owner. Under the laws of the civilized world, such conduct is fraudulent as to third persons.

Rehearing refused.

No. 1074.—PAUL H. MOUSSEAU v. ED. THEBENS AND JAMES REYNOLDS.

A commercial partnership is not liable on the obligations contracted by one of the partners previous to the formation of the partnership, notwithstanding the fact that the partnership was to continue the same business in which the obligations were contracted; and that specified portions thereof were assumed by the individual members.

A party who introduces evidence not admissible under the pleadings, cannot object to testimony being offered by the opposite party to rebut it.

**A**PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*T. W. Collens*, for plaintiff and appellant. *J. Q. A. Fellows*, for defendants and appellees.

**LABAUVE, J.** The petition alleges, in substance, that the defendants, commercial partners, are indebted to the plaintiff in the sum of \$358 53; that petitioner, in the months of November, 1860, and January and March, 1861, did sell and deliver to said Edward Thebens, then doing business on his own account, various articles of marble of the value of \$358 53, as per account annexed, making part of the petition; that on the 6th of April, 1861, the defendants formed a copartnership, and by the act of copartnership, their firm assumed all the liabilities due by said Thebens upon the stock in trade.

He prays for a judgment *in solido* against both defendants, with legal interest from the 2d of March, 1861.

James Reynolds, in his answer, pleaded the general issue. A final judgment by default was rendered against Edward Thebens, and a contradictory one in favor of James Reynolds. The plaintiff appealed.

The correctness of the account, as against Edward Thebens, is admitted.

The ground of action, as against James Reynolds, is that the partnership assumed all the liabilities of and due by Thebens. This question must be solved by the construction given to the following clauses in the act of partnership:

Mousseau v. Thebens and Reynolds.

"The said Edward Thebens brings in stock valued here at...	\$1,304 69
His liabilities are .....	800 00
Balance.....	\$ 504 69
And the said James Reynolds brings in stock here valued at \$909 61; and he has no liabilities.	
To equalize shares of the partners in the partnership, the said James Reynolds is to pay \$395 08, due by said Thebens, making Reynolds' interest in the partnership.....	\$1,304 69
And the said Thebens is to pay the balance of said \$800, which is	404 92
Add the value of his stock, less amount of said \$800, liabilities, say.....	504 69
And gives his notes, equal to cash, to said Reynolds, for.....	395 08
Making his interest in the partnership.....	\$1,304 69

We find nothing here showing that the partnership assumed the debts due by Edward Thebens, say \$800.

On the contrary, James Reynolds assumes, in his own name, \$395 05 thereof, and Thebens is to pay the balance, say \$404 92.

James Reynolds is not sued upon his individual assumpsit, but he is sued as commercial partner, upon the alleged assumpsit by the partnership. Even, had that ground been taken against Reynolds, he has proved that he had paid the sum thus assumed; it is true, that the testimony offered to prove payment, was objected to on the ground that Reynolds had not pleaded payment. The Court properly admitted the evidence, on the ground that the act of partnership introduced in evidence, showed this individual assumpsit, which was not alleged as a ground of action against Reynolds. Plaintiff, having opened the door to testimony upon that ground not alleged by him, he could not object to defendant's proof to diminish or destroy it by showing payment. *Thompson v. Brothers*, 5 L. 279.

A party, who introduces evidence not admissible under the pleadings, cannot complain if the other party offer testimony to rebut it.

Judgment affirmed, with costs.

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1024.—JOHN H. RUSSELL v. DR. ED. KUNEMANN.

The sale of a horse, by a person employed by the owner as groom for his stable, is an absolute nullity, and the owner can recover back his property or the value thereof, with damages from the purchaser.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*Marr & Foute*, for plaintiff and appellant. *Lambert & Murphy*, for defendant and appellee.

HYMAN, C. J. Plaintiff, intending to leave New Orleans on a visit to Washington City, left his horses, about ten in number, at the stable of A. W. Beatty, and authorized him as well as a Mr. Ainsley to sell them.

Learning plaintiff's absence from New Orleans, Edward Harrison sold one of the horses to the defendant, and plaintiff has brought suit against

defendant to recover the horse sold by Harrison, or its value, alleged and proved to be worth \$300, and damages for its abuse and detention by defendant.

Plaintiff had the horse sequestered, and defendant bonded him.

Defendant, in answer, claimed to have bought the horse, not from its owner but from Harrison, who represented the owner.

No authority was given by plaintiff to Harrison to sell the horse, and defendant's position is, that as he is an innocent purchaser, and as the conduct of plaintiff caused him to believe that Harrison had a right to dispose of the horse, plaintiff must bear the loss.

If plaintiff's conduct was such, he has no right to recover; but the evidence does not disclose such conduct on the part of the plaintiff.

It appears that plaintiff had employed Harrison, as a groom for his horses. When he left for Washington he did not intrust them to the groom, but placed them in charge of Beatty and Ainsley, experienced and responsible men, established in business. Ainsley retained Harrison in Beatty's stable, to clean, feed, and exercise the horses, and to keep the stable clean. No imprudence or want of circumspection can be imputed to plaintiff, whereby defendant could have been induced to believe that he had placed the right in Harrison to dispose of his horse; nor do we perceive, in the evidence, such imprudence in his agents as would justify defendant in supposing that Harrison was invested with any control over the horses but that of a groom.

The defendant visited the stable of Beatty while the horses were there, and before he purchased from Harrison, for the purpose of buying a horse, yet he neither informed Beatty, the owner of the stable, nor Ainsley, that he intended to buy a horse from the groom, though he certainly must have known that it was not the business of the groom to sell the horses in the stable.

We think that defendant was not sufficiently circumspect in buying the horse.

The evidence adduced is not satisfactory as to the amount of damages sustained by plaintiff.

It is suggested that the Court has not appellate jurisdiction of this case. The amount in dispute certainly exceeds three hundred dollars, and when so, the Court has jurisdiction. See Constitution of 1864, Art. 70.

The judgment of the District Court was in favor of defendant; it must be reversed.

It is decreed that the judgment of the District Court be reversed; and it is further decreed, that plaintiff be recognized owner of the horse in controversy, and that defendant deliver the horse to plaintiff, or pay plaintiff three hundred dollars, the value thereof, reserving to plaintiff the right to claim damages by another suit; it is further decreed, that the defendant pay the costs of this suit.

No. 1071.—ROBT. J. HALLEY v. MICHAEL HOFFNER.

The doctrine in the case of *Wainwright v. Bridges*, (ante page 234) reaffirmed.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*J. M. Dirhammer*, for plaintiff and appellant. *Race, Foster & E. T. Merrick*, for defendant and appellee.

Halley v. Hoeffner.

*Brief of Race, Foster & E. T. Merrick, for defendant and appellee.*—On the 6th day of June, 1861, the plaintiff sold a negro woman, Phillis, and her three children to defendant for the sum of \$1,800, payable \$800 in cash and balance at twelve months, for note of defendant secured by mortgage on the property conveyed. See act of sale, pages 12 and 13.

This suit is brought by the vendor of the once four slaves, against the purchaser on that mortgage note of \$1,000, to enforce its payment. See petition, answer p. 7, *et seq.*, the note, p. 3, and act of mortgage p. 12.

The defence is, the want and failure of the consideration of the note, by reason of the emancipation of all slaves, etc. Answer, p. 7, *et seq.*

The case was submitted to a jury, with a strong charge from his honor, the Judge presiding, in favor of the plaintiff's right to recover, etc., and notwithstanding this, a verdict was rendered in favor of defendant, on which judgment was rendered in his favor, from which plaintiff has taken this appeal.

This verdict was rendered on the 25th day of May, 1866, and is believed to have been the first in this State, invalidating notes given for slave property.

After the numerous decisions of this question by this Honorable Court, adversely to the pretensions of the plaintiff and appellant, counsel will content themselves by referring to the case of *Wainwright, Administrator, v. Alice F. Bridges, et als.*, decided in May last, and to the subsequent cases.

HOWELL, J. This is a suit on a promissory note, which, it is alleged and shown in the defence, was given in part payment of the price of slaves, and is governed by the doctrine settled in the case of *Wainwright v. Bridges*, and for the reasons therein assigned the judgment is affirmed, with costs.

Justices LISLEY and LABAUVE dissenting.

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No. 1069.—S. H. KENNEDY & Co. v. CHARLES ROMAN et al.—Owners of Steamboat RUBY.

Where a steamboat or other vessel arrives at a port with freight consigned to different parties residing there, a delivery of the goods on the wharf to the agent of the consignee, or some person authorized to receive them, or some act must be done which is equivalent to delivery, in order to relieve the owners of vessels from responsibility.

To constitute a delivery, there must be a notice given to the consignee, and a reasonable time given him to make the necessary preparations to receive the goods.

**A** PPEAL from the Sixth District Court of New Orleans, *Duplantier. J. Randolph, Singleton & Hardie, and Lacey, Marks & Butler*, for plaintiffs and appellants. *Trist & Olivier*, for defendants and appellees.

LABAUVE, J. This suit is brought against the defendants for the value of three bales of cotton, shipped on board steamer Ruby, and not delivered. The plaintiffs claim \$739 88.

The answer contains a general denial, and an allegation that Charles Olivier, one of the defendants, was not owner or part owner of said steamer; it admits the shipment of the three bales of cotton, but states that upon the arrival of the steamboat Ruby at the port of New Orleans,

on the 16th November, 1865, notice of the consignment of said cotton was duly given to plaintiffs, but they neglected for more than two days to send for it; that the two successive nights, said cotton was guarded by a watchman employed at respondents' expense; that said cotton was stolen more than forty-eight hours after being landed on the levee, and after its landing was known to plaintiffs.

They claim in reconvention six dollars for freight of said three bales of cotton.

The Court below rejected plaintiffs' demand, and gave judgment for defendants in reconvention for six dollars. The plaintiffs appealed.

The shipment being admitted, it is incumbent on the defendants to show that they have complied with their obligation, by carrying the cotton to its place of destination, and delivering the same to the consignees, or show good cause why they have not done so.

By the bill of lading, they undertook to carry without delay to the port of New Orleans, and to deliver unto the plaintiffs the said three bales of cotton.

The boat arrived at New Orleans November 16th, at noon, and discharged her freight shortly afterwards; that from Thursday evening, day of her arrival, to Saturday following, the cotton remained on the levee; that between the hours of one and three o'clock of that day, it was stolen; no actual delivery of the cotton was made to plaintiffs.

On trial of the case below, the witness, Andre, having stated that he called at the office of S. H. Kennedy & Co. on Monday morning preceding the arrival of the Ruby, and asked a person in said office, who appeared to belong to the house of plaintiffs, if the plaintiffs had not received the bill of lading for the three bales of cotton, and was answered that they had, but the plaintiffs objected to the evidence, on the ground that it was hearsay, and that the evidence of the person who made the answer, was the best, and that it did not appear who the person asked was, or if he had anything to do with the bill of lading. The Court rejected the evidence after sustaining the objections. We are of opinion the Court did not err; the defendants should have shown with certainty, that this person was one of the firm.

In the case of *Slade et al v. Payne & Harrison*, 14 A. 453, it was decided, 1st. That in order to relieve the owners of vessels from responsibility, there must be a delivery on the wharf to some person authorized to receive the goods, or some act done which is an equivalent to a delivery; 2d. That in order to constitute a delivery, there must be a notice given to the consignee, and a reasonable time given him to make the usual and necessary preparations to receive the goods; 3d. That the manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of particular places, and the usages of the particular trades.

This case turns upon a question of delivery, or something equivalent.

Newspapers were introduced in evidence, in which the list of freight, with the consignees' names inserted, but nothing shows that knowledge of it was brought home to the plaintiffs. 3 L. 227. 6 A. 579. Mahoney pretended to be the drayman of plaintiffs; was requested to take the cot-



ton away, and he promised to do so, but nothing shows that he was the agent of plaintiffs, and authorized to receive freight.

It appears that the plaintiffs received the bill of lading sent to them by the shippers, but we are not satisfied that, when they received it, they were aware that the boat had arrived. We will not pass, finally, upon the responsibility of the defendants, as the case must be remanded for further evidence.

We find nothing in the record showing the value of the cotton, so as to enable us to give judgment for plaintiffs.

It is therefore ordered and decreed, that the judgment be reversed, and that the case be remanded to be tried according to law, and both parties allowed to adduce further evidence, the appellee to pay the costs of this appeal.

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No. 1036.—SOSTHENE ROMAN v. J. DENNY et als.

Where a *feri facias*, under which property has been seized, is returned not satisfied before the property is sold, the proceeding under the writ will be considered to have been abandoned, and the seizing creditor cannot claim the benefit of any privilege which the seizure gave him on the fruits of the property seized.

To enable the plaintiff to sell the property, an *alias fieri facias* must be issued, and a new seizure be made and new notice be given.

The fruits or revenues of real estate which accrue and are separated and gathered from the land prior to the date of the seizure, cannot be sold by the sheriff in satisfaction of the writ in his hands; only such fruits as are produced or gathered since the seizure was made inure to the benefit of the seizing creditor. C. C. 457.

**A** PPEAL from the Second District Court of New Orleans, *Thomas, J. C. Roselius* and *Alfred Philips*, for appellants. *Fellows & Mills*, *Buchanan & Gilmore*, for appellees.

*Brief of Roselius & Philips, for appellants.*—On the 24th of May, 1861, the plaintiff applied for and obtained an order of seizure and sale, founded on the vendor's privilege and special mortgage on a sugar plantation and its appurtenances, which he had sold to the defendants. After the seizure had been made, one of the defendants, Jacob Denny, applied for and obtained a suspensive appeal, from the order of seizure and sale. In consequence of the civil war, the case remained undecided in the Supreme Court until the 12th June, 1865, when the judgment was affirmed. An *alias* order of seizure and sale having been taken out, a controversy arose in relation to a quantity of sugar, molasses, etc., found on the plantation, which was claimed by Forsyth and others, who allege that they were lessees of the property under Denny. By consent of parties these products were consigned to the firm of Eugene Rochereau & Co., to be sold, and the proceeds held subject to the decision of the Court.

On the 6th January, 1866, the plantation was adjudicated by the sheriff, under the *alias* order of seizure and sale, to the plaintiff in the suit.

The alleged lessees intervened, and claimed the proceeds of the sale of the sugar, molasses, etc., sold by Rochereau & Co.

Judgment, having been rendered in their favor by the District Court, the plaintiffs appealed.

These products were raised on the plantation since the seizure in 1861; and it is respectfully submitted that the solution of the question is found in Article 457 of the Code, which provides, that "the fruits of an immovable gathered or produced since it was under seizure, are considered as making part thereof, and inure to the benefit of the person making the seizure." The seizure was never abandoned; and the suspensive appeal left the matter in *statu quo* during its pendency. Its final result depended on the judgment of the Supreme Court; and that judgment having been in affirmance of the order of seizure and sale, the parties occupy the same position as if no appeal had been taken. It is said that the writ was returned by the sheriff, and that thereby the seizure was abandoned. But no such conclusion can fairly be drawn from that fact. The execution of the writ was arrested by the suspensive appeal, during a period of five years, and the officer had to make a return to the Court for the purpose of showing why he had not executed its mandate.

We contend, in the second place, that the intervenors have not established their claim to this fund; first, because Denny, their pretended lessor, had no right to give a lease to them after the property was under seizure; and secondly, because their pretended lease is under private signature, and has no date, so far as third persons are concerned, until it was filed in this suit.

*Brief of Fellows & Mills, Buchanan & Gilmore, for appellees.*—The legal question, on the answer to which this cause mainly turns, is the date of the seizure under which the mortgaged property of defendants was sold.

The appellees, intervenors, contend—and with whom the Judge *a quo* agrees, that the actual seizure was made on the 16th November, 1865. The appellants insist that it was on the 24th of May, 1861.

The importance of the question is this: If the seizure be considered as of 16th November, 1865, then the crop and fruits of the plantation gathered before the seizure, though subsequent to 24th May, 1861, are not covered by the seizure.

If the seizure, under which the property was sold, be held to be that of May 24th, 1861, as contended for by appellants, then the said fruits and revenues are legally covered by the seizure.

The record shows the following facts: On 25th May, 1861, a writ of seizure and sale issued.

On 12th June, 1861, the plantation was seized.

On 26th July, 1861, the writ was arrested by a suspensive appeal.

On 13th July, 1865, after decision by Supreme Court, an *alias* writ of seizure and sale was issued.

On 2d August, 1865, the sheriff again seized the plantation. His return states: "Received the within writ of seizure and sale on the 17th July, 1865. On the 2d of August, same year, seized the property, as will be fully shown by the annexed notice of seizure."

"And on the 23d August, same year, received the annexed order from Headquarters, Military Department, postponing and suspending all pro-

ceedings; wherefore, I return said writ of seizure and sale to this Honorable Court not satisfied. August 24th, 1865."

On the 16th November, 1865, another *alias* writ of seizure and sale was received by the sheriff, who, in his return, says: "Received the within writ of seizure and sale on the 16th November, 1865. On the same day I seized and took into my possession the within named and described property."

On this statement of facts, as established by the record, it is submitted that the ruling of the District Court is correct in fixing the date of the actual seizure under which the property was sold, as the 16th November, 1865.

A valid seizure is an act of corporeal possession by the sheriff. Its duration depends upon the time such possession is held by the sheriff. It has no effect until such possession is acquired. It ceases with such possession. That possession of the sheriff rests only on the writ. When he returned the writ on the 25th of August, 1865, the seizure and possession of the sheriff necessarily ceased. (See *Black v. Callett*, 1 Rob. 540.) Hence, while it be true that "the fruits of an immovable, gathered or produced since it was under seizure, are considered as making a part thereof, and inure to the benefit of the person making the seizure," yet, as the crops and fruits claimed in the case at bar were gathered previous to the 16th of November, 1865, the date of the actual seizure under which the property was sold, such crops and fruits, gathered before that time, are not affected by such seizure.

The 456th Article of the Code covers the facts: "As soon as the crop is cut down, and the fruits gathered or the trees cut down, although not yet carried off, they are movables."

If corroborative proof of the correctness of the opinion of the District Judge were required, it could be found in the record.

1st. The continuous actual possession of the plantation by Denny and the Forsyths, from the date of the suspensive appeal until the seizure on the 16th of November, 1865, shows that the sheriff was not in possession of the mortgaged property.

The fact of the subsequent seizure by the sheriff, shows abandonment of the previous seizures.

The agreement between the widow and heirs of Roman and the Forsyths, on the 29th of April, 1863, shows that said widow and heirs did not consider the plantation to be then under seizure, for it recites "that in case the Magnolia plantation is seized under the legal process," etc., said Roman "will keep said J. & C. Forsyth in possession as keepers or otherwise," clearly admitting a previous possession of the Forsyths.

The judgment of the Supreme Court decrees: "It is ordered, adjudged and decreed, that the order of seizure and sale be affirmed, and that the sheriff seize and sell the property therein described in the order, except the negroes therein mentioned." Why should a new seizure have been ordered, if the original seizure had been considered in force?

Again, the original seizure in May, 1861, was clearly illegal, for it was made previous to notification of parties defendant. See record, and cases of *State v. Judge of Second District Court of New Orleans—On Relation of*

*Jacob Denny*, 16 An. 390; and *Koman v. Denny*, 17 An. 126; *McDonogh v. Fost*, 1 Rob. 297. 14 An. 105.

HOWELL, J. This contest arises under the 457th Article C. C., which provides that "the fruits of an immovable gathered or produced since it was under seizure, are considered as making part thereof, and inure to the benefit of the person making the seizure;" and the question to be determined is: at what date the seizure, under which the mortgaged property of defendants was actually made. The appellants, representatives of plaintiff, contend that it was made on 24th May, 1861; while the appellees, intervenors and lessees of the property, insist that it was made on 16th November, 1865.

The record shows the following facts: On 25th May, 1861, a writ of seizure and sale issued; on 12th June following, the sheriff of the parish of St. James seized the plantation, and on 26th July, same year, the writ was arrested by a suspensive appeal, allowed upon a *mandamus* from the Supreme Court, which issued on the ground that no legal seizure had been made. After which a rule was taken by two of the defendants to obtain possession from the sheriff, which on 14th January, 1862, was made absolute, on the ground that the seizure was illegal and null, from which ruling no appeal has been taken. On the appeal in the cause, this Court in 1865, affirmed the judgment of seizure and sale, and ordered the sheriff to seize and sell the property described in the order. An *alias* writ issued on 13th July, 1865, under which the sheriff seized the property on 2d August following, and on the 24th same month, he returned the said writ not satisfied, in consequence of a military order suspending all proceedings. And on the 16th November, 1865, another *alias* writ was received by the sheriff, who, in his return, says: "Received the within writ of seizure and sale on the 16th November, 1865. On the same day, I seized and took into my possession the within named and described property." Under this writ the property was sold. It also appears that Denny leased the said plantation to J. & C. Forsyth, intervenors, for two years, beginning on 2d January, 1865, while the appeal was pending.

From this statement of facts, it is manifest that the District Court did not err in fixing the 16th November, 1865, as the date of the actual seizure, under which the property was sold; and as the fruits in controversy were gathered prior to that date, they were properly awarded to the intervenors, whose right to them seems to be fully established.

We think the record shows that the sheriff did not have possession after the judgment on the rule in January, 1862, ordering the defendants to be put in possession, until he again seized in August, 1865, when he again abandoned possession and seizure, by returning the writ unsatisfied. 1 R. 540.

The appellees have asked an amendment of the judgment, so as to allow them the value of other property claimed by them, and not included in the proceeds of the crop. This claim is for one-half the value of a saw-mill on the place when rented by the Forsyths, a railway and cars put thereon by them, lumber, cord-wood and corn, amounting to \$11,026, and it seems not to have received any consideration in the action of the

Roman v. Denny et als.

District Judge, further than in reserving intervenors' rights to all damages incurred.

As the evidence, on this point, is not altogether satisfactory, and counsel for appellees have not referred to the subject in their brief, we will not disturb the judgment in this respect.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

No. 1060.—JONATHAN EMANUEL v. CHARLES F. HATCHER.

The reasons for the judgment rendered by the District Court were: "When after hearing evidence and argument of counsel, and considering the law, evidence and argument, it is ordered" etc: *Held*—That this is as much a reason for judgment in favor of defendant as of plaintiff, and does not meet the requirements of the Constitution, Art. 76, Tit. 5, Con. 1864.

The Supreme Court has the power to render in the premises such a judgment as the Court below should have rendered; and where the evidence is before the appellate Court to enable it to do so, a final judgment will be pronounced, after declaring the judgment of the lower Court null and void.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J. Phillips & Levy*, for plaintiff and appellee. *W. B. Koontz*, for defendant and appellant.

**ILSLEY, J.** This action is founded on a contract of lease, made in the city of Mobile, Ala.

There was judgment for the plaintiff, and the defendant has appealed.

The final judgment contains none of the reasons in which it was rendered.

A reason for a judgment, the one assigned in this case, viz: "When after hearing evidence and argument of counsel, and considering the law, evidence and argument," is as much a reason for judgment in favor of defendant as of plaintiff. *Police Jury v. Bozman*, 11 A. 94. 18 A. 360.

The judgment therefore is unconstitutional, (Art. 76, tit. 5, Con. 1864) but this Court has the power to render in the premises, such judgment as the Court below should have rendered, there being in the record sufficient evidence to enable it to do so. *Hatcher, Tutor, v. Dodd*, 12 La. 143.

The lease is admitted, and it is not shown that any particular currency was stipulated, in which the rent was to be paid.

The defendant has only himself to blame, if the property leased was occupied by the military authorities, as he abandoned the leased premises. That defence therefore cannot avail him; even, as the plaintiff maintains, if the common law, "regarding a lease as an absolute purchase for the time, would not justify the application of the maxim  *caveat emptor*."

We think the plaintiff has fully made out his case; and for the reasons here given, it is ordered, adjudged and decreed, that the judgment of the lower Court be avoided and reversed, and proceeding to pronounce such judgment as should have been pronounced by the lower Court for the reasons aforesaid, it is ordered, adjudged and decreed by this Court that there be judgment in favor of Jonathan Emanuel, the plaintiff, and against Charles F. Hatcher, the defendant, for the sum of twelve hundred



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and seventy-five dollars, with legal interest on four hundred and twenty-five dollars, from the 1st May, 1865, on four hundred and twenty-five dollars from the first of August, 1865, and on four hundred and twenty-five dollars from the first of November, 1865, the costs of the lower Court to be paid by the defendant, and those of this Court by the plaintiff and appellee.

## No. 1063.—WILLIAM HUNT v. J. M. STONE et al.

Payment of a promissory note to the holder, endorsed in blank, will discharge the drawer and endorser.

Where the drawer and endorser of a promissory note seek to avoid payment on the ground that the holder is not the owner thereof, and that they have equities against the real owner, the burden of proof is on them to show the equities that exist.

The holder of a promissory note, though he is only the agent of the owner, may sue and recover judgment in his own name.

**A**PPEAL from the Fifth District Court of New Orleans, *Leaumont, J. Whitaker, Fellows & Mills*, for plaintiff and appellee. *Geo. S. Lacey* and *Alexander Marks*, for defendants and appellants.

**LABAUVE, J.** The plaintiff claims of the defendants *in solido*, the sum of \$3,000, with interest, upon a note signed by Stone and endorsed by Chase, both defendants.

The defendants answered by a general denial; admitted their signatures as maker and endorser. They further averred that the plaintiff was not the owner of the note, but that it belonged to one Ross; that said plaintiff acquired the same under such circumstances as to subject the said note to certain equities, which could have been urged against said Ross; they specify those equities, going to show a failure of consideration.

The Court, after hearing the evidence, gave judgment for plaintiff, and the defendants appealed.

Alexander Ross, from whom plaintiff acquired the note, clearly shows a consideration, and defendants have not attempted to prove the equities by them pleaded. The plaintiff was interrogated, and he shows that he acquired the note in good faith, and that he is the holder thereof, subject to a certain stipulation between him and Ross: that when the note was collected, the plaintiff should pay over to Ross whatever sum should be realized after paying all expenses of collection, and the sum of \$1,800 and interest, due by said Ross to plaintiff. This is a matter with which the defendants have nothing to do; the note is payable to order, and endorsed in blank by the payee; the plaintiff, being the holder, is entitled to receive payment thereof. C. C., Art. 2141, No. 1. Even if the plaintiff were only agent of Ross, it is well settled that he might sue in his own name. 2 L. 264.

Judgment affirmed, with costs.

## No. 1056.—JOHN LYNN v. J. LOWENTHAL.

Any amendment of the judgment of the Court below must be prayed for in the answer to the appeal; otherwise, it will not be noticed by the Supreme Court.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*J. J. E. Planchard and E. Warren*, for plaintiff and appellee. *T. L. Lemly and J. B. Cotton*, for defendant and appellant.

**LISLEY, J.** The plaintiff claims as damages in this suit, *four hundred and fifty dollars.*

He occupied as a coffee-house, the first floor of the house No. 56, in Perdido street, and, at the same time, the defendant was permitted to occupy the garret in the same building.

During this joint occupancy of the house, the effects of the plaintiff in his coffee-house, consisting principally of cigars, salt, coffee, spices, etc., were greatly damaged by water from the defendant's hydrant in the garret, which, through his fault or negligence, was left open, and by which the plaintiff's coffee-house room was completely flooded.

A careful examination of the evidence has satisfied us, that the damage sustained by the plaintiff, through the defendant's negligence, was greater than the lower Court awarded to him. He has not prayed in his *answer* to the appeal for any amendment of the judgment, and it will not be noticed in his brief, (*Hite v. Barker*, 17 An. 141) and the defendant being liable to the plaintiff for the damage sustained by him, (see 2294, 2295 and 2296, C. C.,) has no cause to complain of the judgment against him.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, at the costs of the appellant.

## No. 1057.—HENRY HINCK v. THE HOME INSURANCE CO. OF NEW YORK.

Where an insurance company has effected an insurance on merchandise, with the words in the policy, *laden or to be laden* on board, and the bill of lading for a part of the goods bears date anterior to the date of the policy, and the defendant pleads the general issue, it must be held to include all the goods embraced in the contract of insurance, laden and to be laden.

The insurer must make a special defence to put the insured to the proof, that all the goods were actually at risk.

**A** PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*M. M. Cohen*, for plaintiff and appellee. *L. Madison Day*, for defendants and appellants.

**HOWELL, J.** The defendants have appealed from a judgment condemning them to pay plaintiff \$5,000, balance due on an insurance of goods, valued in the policy at \$8,000; and they urge, in the oral argument before us, two grounds for a reversal, to wit: Plaintiff has failed to show, 1st, that all the goods, intended to be included in the policy, were actually shipped; and 2d, the loss. The second point is put at rest by the proof of a partial payment (say \$3,000) on the claim after the loss. As to the

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first, we think the proof sufficient under the pleadings. The language or terms in the policy on which this defence is based, are: "Goods and merchandise laden or *to be laden* on board the good steamer Shooting Star." The answer was a general denial, and on the trial plaintiff introduced in evidence the bill of lading, dated two days subsequent to that of the policy, and which, without some allegation or proof of deficiency, error or fraud, must be held to include all the goods embraced in the contract of insurance, 'laden and to be laden.' "The valuation, in case of goods, looks to all the goods intended to be loaded," (1 Arnould, § 125) and the insurer must make a special defence, to put the insured to the proof that all the goods were actually at risk.

We consider it unnecessary to pass on the bill of exceptions in the record, as the exclusion of the evidence objected to would not affect our conclusion.

Judgment affirmed, with costs.

No. 1035.—W. G. VINCENT, Administrator, *v.* A. MERLE D'AUBIGNE.

It is the settled jurisprudence of this State, that a tutor of minor children is competent in that capacity to administer the succession of the deceased, so long as not opposed by the creditors.

The law requiring property, sold at succession or probate sale, to bring its appraisement, does not apply to a case where the succession property has been mortgaged, and the creditor has had the property sold under executory process; in such cases, the law regulating the sale of property under execution governs as to the amount of the bid.

Property sold under a writ of *feri facias*, or by virtue of an order of seizure and sale, must bring two-thirds of its appraisement in cash, otherwise it cannot be sold.

**A** PPEAL from the Second District Court of New Orleans, *Thomas, J. P. H. Morgan*, for plaintiff and appellee. *C. Roselius* and *A. Philips*, for defendant and appellant.

**LSLEY, J.** This action is brought to avoid a sale made in pursuance of executory process.

Two grounds of nullity are set up:

1. When the executory process was issued and the property sold, the succession of McIlhenny was unrepresented by an administrator, and L. C. Davis, who was merely tutor to the minor McIlhenny, appointed without bond, was made a party defendant in said suit, and that notice of seizure served on him was insufficient, he being incapable of standing in judgment.

2. The property should not have been sold for less than fifteen thousand dollars, at which it was appraised in the inventory of the succession.

Judgment was rendered in the lower Court in favor of the plaintiff, and the defendant has appealed.

On the first ground, it is only necessary to say that we consider the jurisprudence settled, that a tutor of minor children is competent, in that capacity, to administer the succession of the deceased, so long as the creditors do not object.

This subject was thoroughly examined in the case of *Bryan v. Atchison*, 2 An. 465, which rested on more recent legislation than that of the Civil Code, upon which alone was based the previous antagonistic opinions of the Court, no allusions in those opinions having been made to Article 976 of the Code of Practice, the last expression of legislative will.

It would be needless for this Court to multiply the reasons already adduced in support of the doctrine taught in *Bryan v. Atchison*, to the effect, that the tutor of a minor or of minor children is competent, in that capacity, to administer the succession, so long as the creditors do not object. A doctrine again recognized broadly in the case of *Dickason v. Smith*, 5 An. 197, and now by us adopted as correct in principle.

L. C. Davis was, it is admitted, the tutor of the minor McIlhenny, and his appointment, as such, is presumed to have been regular and legal; and his being *dativ*e and not *natural* tutor, was no impediment to his being a party in the executory proceeding. Art. 327, C. C.

There is no proof in the record that the succession was an insolvent one, as was suggested by the Judge of the lower Court, in his reasons for judgment.

The second ground of nullity is equally untenable.

An hypothecary creditor has two distinct remedies against property in a succession, subject to his lien, either to procure an order of seizure and sale, or a rule on the administrator, to show cause why the property should not be sold according to Articles 990, 991 and 992 of the Code of Practice. *Mason, Ex'r. v. Williams*, 12 A. 68.

If he proceeds, as he has the legal right to do, by way of seizure and sale, (*Boguille v. Taille*, 1 An. 205, and *McCalop v. Fluker's Heirs*, 12 A. 551.) he is bound to observe all the rules of proceeding, and no others, relating to executory process. C. P. 732, *et seq.*

Article 680 of the Code of Practice, one of the articles referred to in Article 745, C. P., requires that the price offered by the highest and last bidder, shall reach two-thirds of the appraisal of the property offered. The property in controversy was regularly appraised at *twelve* thousand dollars, and it was adjudicated to the defendant for *nine* thousand dollars.

The property was, therefore, on that score, legally adjudicated.

The authority cited by the plaintiff, that the property sold should have brought the full amount of the appraisal in the inventory of the succession property; See *Succession of Fitz*, 12 An. 368, as well as the cases of the *Succession of Porter*, 5 Rob. 95; and the *Succession of George B. Ogden*, 10 Rob. 437, relate to succession sales under Articles 990, 991 and 992 C. P., and not to actions *via executiva* against encumbered succession property.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; it is further ordered, adjudged and decreed, that there be judgment in favor of A. Merle D'Aubignié, the defendant, and that the adjudication to him of the property described in the plaintiff's petition, made by the sheriff of the parish of Orleans on the 13th May, 1865, in the suit of A. Merle

Vincent, Administrator, v. D'Aubigne.

*D'Aubigné*, through his agent, *John W. Lavillebeuvre*, v. *George S. Mandeville* and *G. C. L. Davis*, No. 25,287, on the docket of the Second District Court of New Orleans, be maintained as against the plaintiff in this suit, *William G. Vincent*, administrator of the *Succession of Rufus McIlhenny*, and it is further ordered that the said plaintiff and appellee pay the costs in the District Court, and in this Court.

No. 1045.—GUY DUPLANTIER v. J. B. MICHOD.

Where an attorney-at-law has rendered services in his professional capacity to an estate, and the universal legatee has agreed to pay him a certain amount agreed upon, and makes a partial payment in liquidation thereof, the attorney may sue on this acknowledgment, and recover the balance against the succession. In such a case, the defendant representing the estate, cannot successfully urge the plea of *res judicata*, where the amount first paid has been placed on the tableau, and a judgment rendered allowing his claim which has been paid.

Where the defendant alleges a written contract, he will not be allowed to prove by parol a verbal acknowledgment by plaintiff, nor will he be allowed to amend his answer by striking out the word "written," when the case is on trial, in order to enlarge the evidence.

**A**PPEAL from the Fifth District Court of New Orleans, *Leaumont, J.*  
*E. Bermudez*, for plaintiff and appellee. *T. W. Collens*, for defendant and appellant.

**LABAUVE, J.** The plaintiff alleges, in substance, that as counsellor-at-law, he has rendered services to the executors of the late *Antoine Michoud*, in the settlement of the succession of the said *Michoud*, well worth the sum of two thousand dollars, in part payment of which he received one thousand dollars; that said services extended to the putting in possession of the universal legatee, *J. B. Michoud*; that after said services had been rendered, said *Michoud* acknowledged himself indebted unto petitioner for the same, in the sum of \$2,000, one-half of which had already been paid, and agreed to pay the balance of \$1,000.

He prays for judgment accordingly, against said *J. B. Michoud*.

The defendant excepted to the petition, alleging that plaintiff has included in his demand the services rendered previous to the tableau of distribution; that he has no right to do so, the cause of action for said services which are merged in the judgment rendered on said tableau, forming *res judicata*; that the only right plaintiff has, is an action for the services rendered subsequent to the judgment on said tableau.

He prays that the suit be dismissed, at plaintiff's costs.

The Court, after hearing the evidence upon this exception, dismissed the same.

The defendant, in support of his exception, relies upon the following entry on the said tableau, which was duly homologated:

"Guy Duplantier, attorney of succession, his fees for services to the filing of tableau \$1,000, proportion, \$342 46."

We are of opinion that the exception was properly overruled upon the allegations in the petition, that the services extending to the putting in possession of the universal legatee, *J. B. Michoud*, after having been rendered, were acknowledged by said *J. B. Michoud*, who acknowledged



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himself indebted unto petitioner for the same in the sum of \$2,000, one-half of which had already been paid, and he agreed to pay the balance of \$1,000.

The answer, on the merits, contains a general denial, reserving the plea of *res judicata*, and admitting the services rendered to the filing of tableau to be worth \$1,000. The defendant further says, that the payment of \$1,000 was made in error, the plaintiff having agreed in writing to allow the fees earned by Julien Seghers, amounting to \$200, to be deducted from said sum, and he claims said sum of \$200 in reconvention.

The Court below, after hearing the case, gave judgment for plaintiff, and the defendant appealed.

The provisional tableau of distribution referred to, was filed on the 3d and homologated on the 21st of January, 1863. J. B. Michoud, the universal legatee, who is a resident of France, arrived here on the 30th of November, 1863, and he left on the 20th February, 1864. On his leaving, he left with C. Guillet, former executor, the following document:

"Pour règlement définitif de la succession de M. Michoud je demanderai la somme de deux mille piastres; ceci comprend la mise en possession de l'héritier et la décharge des exécuteurs testamentaires."

(Signed)

"G. DUPLANTIER."

This paper was brought into Court by said Guillet, on a *duces tecum*, and offered by the plaintiff in evidence. The defendant objected to its introduction, on the grounds that it is the plaintiff's own act, and is not evidence in his favor; that the plaintiff could not make evidence for himself, by sending a statement in writing to defendant, and then call for its production as proof; that nothing was shown to bind the defendant to the contract proposed in said paper, and even if there had been such proof it was inadmissible under the pleadings, which contain no allegation authorizing such proof.

The Court overruled the objections, and received the document. We are of opinion that the Court did not err; the objections go to the effect and not to the admissibility; had the plaintiff claimed more than \$2,000, this paper would have been good proof for the defendant to reject the surplus, and the plaintiff might show that the defendant had acquiesced in or accepted it.

The defendant objected to proof of value of services rendered previous to the filing of tableau, and relied to support his objections upon the plea of *res judicata*; that plea being overruled, the Court properly received the evidence under the allegation in the petition, that such services were worth \$2,000.

The defendant did not except to the petition on the grounds that the claim was based on a *quantum meruit*, and on a contract.

The defendant offered to prove by a witness, as alleged in his answer, that Duplantier, plaintiff, had agreed to deduct the \$200 paid to Seghers, from his fees; plaintiff objected to said proof, on the ground that the answer alleged a written agreement. The Court sustained the objection. The defendant then moved to amend his answer by striking out the word *written*; it was objected to, and amendment refused. The Court decided properly. The defendant had restricted his own evidence, and no other

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proof could be received, and the case being on trial, it was too late to amend in order to enlarge the evidence. 19 L. 542. 1 R. 58. 13 An. 536. 14 An. 355.

There are two other bills of exceptions taken by defendant, and as the conclusion we have come to would not be changed by a decision upon them, we pass them unnoticed.

Gustave Tournade testified; he says:

"I know the parties to this suit; I was present at the conversation between them, as to the payment of Guy Duplantier, attorney for J. B. Michoud. Mr. Michoud came to the office of Duplantier, and began conversation with him in relation to his fees in the succession of Michoud; he wanted to obtain a reduction; he thought the fee was too high, which reduction Duplantier refused to grant, stating that it was a reasonable fee, the amount being \$2,000. Then Mr. Michoud stated he could pay Duplantier, and was in the act of drawing out his pocket-book, when his son who accompanied him, remarked that he had not sufficient money to do so; Mr. Michoud then stated that he would pass again, and bring with him sufficient money to pay; this conversation took place, it may be, two years ago."

This testimony is uncontradicted and unimpeached, and coupled with the paper brought into Court by Guillet, and which Michoud had left with him on his leaving for France, satisfies us that there was an understanding between the parties that plaintiff's fees should be \$2,000. If that paper was of no value, binding no one, why did the defendant preserve it so well, and leave it with Guillet? It strikes our mind that it was to be used in case the plaintiff had made a demand for more than \$2,000.

Upon the whole, we are of opinion that plaintiff made out his case; besides this argument, it was fully proven by old members of the bar that the services were worth the amount claimed; some compute a value of \$3,000.

It is therefore ordered and decreed, that the judgment of the District Court be affirmed, with costs.

Rehearing refused.

No. 766.—MOORE & BROWDER, for the use of CHARLES E. ALTER, v. J. B. BRES.

Where A sues for the use of B, and the Court is of opinion, from the facts of the case, that B had no interest in the suit before the action was brought: *Held*—That A was the real plaintiff, who had the control of the suit, and might dismiss the same without the sanction of B.

**A** PPEAL from the Fourth District Court of New Orleans, *Théard, J.*  
*Elmore & King*, for appellant. *Race, Foster & E. T. Merrick*, for appellee. *R. H. Marr*, for *Moore & Browder*.

*Reporter.*—The original opinion in this case is reported in the 18th Annual, page 483. The case should not have been reported until the rehearing was disposed of. See 18th Annual, page 483.

#### ON REHEARING.

HOWELL, J. On the rehearing of this cause, the counsel of Alter present the only point involved, in the following form:

"Whatever rights existed in Moore & Browder before the suit, were transferred to Alter by the fact of their filing a suit for his use and benefit;" and they contend that this point has been expressly decided in the case of *Fowler, for the use of McNair, v. Thompson*, 5 M. 561. That suit was instituted against the real obligor, and was founded on a contract of affreightment made by and in the name of Fowler, who, in the petition, declared that he acted as agent of McNair; but the contract being in the name of Fowler, and every one deemed to stipulate for himself, unless the contrary be expressed, or result from the nature of the agreement, McNair could not act without the assistance of Fowler; and the Court considered the latter's declaration, that he sued for the use of McNair, as amounting under the circumstances, to a relinquishment and transfer of his own right to McNair, and sufficient to enable the latter to appear in the case as the real plaintiff.

The facts in the case before us are quite different. Moore & Browder declare on a contract, personal to themselves, made as factors with a cotton planter, (not a party to the suit) by virtue of which they seek to get the possession of cotton belonging to said planter, but illegally, as they allege, in the hands of the defendant, another factor. There is nothing in the petition which, in our opinion, implies that Moore & Browder had transferred, or ever intended transfer to Alter, their privileged claim upon said cotton, which is the real basis of this action, and on which alone the proceedings against defendant can be maintained, if at all. The only interest disclosed in Alter is his ownership of a draft drawn by the said planter on and accepted by Moore & Browder under their said contract, and which they allege was to be paid out of the cotton, sequestered upon their bond and affidavit, in the hands of defendant. Their prayer is, that the cotton be delivered to them, not to Alter, to pay the draft held by the latter, and an account which they allege is due them, and for a portion of which they swear that they have a privilege on said cotton. The allegations of the petition, taken together, show what the parties meant by the expression, "for the use of Alter," that Moore & Browder would sell the cotton to pay their acceptance held by Alter—an incident in the main suit and not such an agreement as to make him the real plaintiff, and give him the control of this suit. Moore & Browder, being the real actors, have the right to dismiss their demand, which, according to the allegations of the petition, leaves nothing to sustain any right in Alter to be prosecuted in this proceeding. What may be their responsibility to him, growing out of such dismissal, or what rights he may have against said defendant in another action, need not here be considered.

We would remark that the difficulty which we met, but is not urged, in

disposing readily of the case, is technical in its nature. But the issue *before us* has been confined to Alter and the defendant, the only parties making appearance, and we have passed upon the question presented in argument—whether or not Alter is the transferee or assignee of Moore & Browder's rights as against Bres, the defendant. We think he is not shown to be, and that the right of action, as set forth, being in Moore & Browder, and Alter's claim being incidental, they have the control of the suit.

The authorities quoted by counsel for Alter are not considered applicable to the facts and pleadings in this case.

It is therefore ordered, that the judgment heretofore rendered by us remain undisturbed.

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## LIST OF CASES, NOT REPORTED.

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No. 8.—Belleville Iron Works Company *v.* Its Creditors, J. Jeffries.  
No. 256.—Henry Smith *v.* E. F. Mioton.  
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No. 591.—James H. Murphy *v.* Samuel and L. Faswacht.  
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No. 254.—Benjamin Y. Benjamin, Tutor, *v.* H. B. Cressup.  
No. 1143.—State of Louisiana, ex rel., the Citizens' Mutual Ins. Co. *v.*  
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No. 1161.—Eugene W. Blake *v.* Winchester Hall.  
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No. 1199.—Virginie Lacoste *v.* John H. Seibert et al.  
No. 1166.—Byrne, Vance & Co. *v.* M. McCousland, Administrator.  
No. 233.—James H. Mehaffey *v.* Perkins, Campbell & Co.  
No. 1028.—Belford Marionneaux *v.* The Catholic Association of St.  
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No. 1312.—Mrs. Martha P. Atkinson *v.* Wm. Mayo Gray.  
No. 864.—James Tucker *v.* George Colmer.  
No. 1316.—James H. Muse *v.* O. C. Thompson.  
No. 1291.—Mary Jane Wallace *v.* Daniel J. Vernon, Tutor.  
No. 874.—William McCoombs *v.* H. C. Williams.  
No. 809.—James H. Shepherd *v.* A. J. Stuart.

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No. 1236.—A. Ledoux *v.* M. H. Meyer.  
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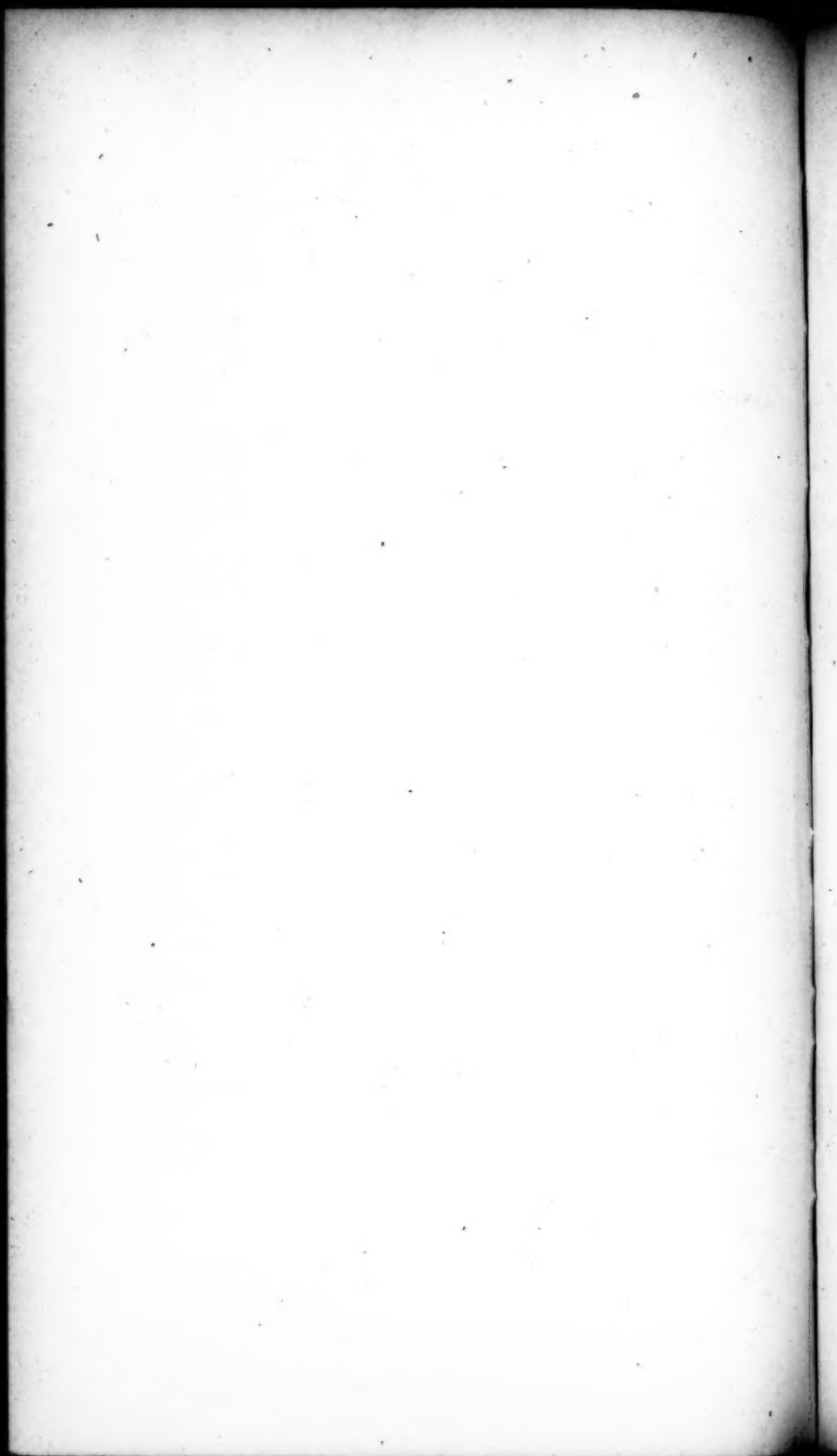
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## ABSENTEE.

1. An absentee having property in the State, or within the jurisdiction of the Court, liable to seizure by his creditors, may be brought into Court by a curator *ad hoc*, without attaching his property.  
*Field & Co. v. New Orleans Delta Newspaper Co.*, 36.
2. The process of attachment is one mode by which the creditor may pursue his debtor, in the cases specified by law, but is not exclusive. In cases where the absent debtor leaves his property without an administrator or agent, the creditor may cause him to be cited through a curator *ad hoc*, and a judgment rendered contradictorily with the curator *ad hoc*, in such cases, is binding on the absent debtor.  
*Ibid.*
3. Where a party, whilst residing in Louisiana, executes a mortgage on his property here, and afterwards removes with his family to another State or country, and remains absent for two or three years, leaving no agent in charge of his property, or authorized to represent him, nor housekeeper in possession of his former domicile and residence, with no known intention of returning, he must be regarded and treated by the mortgage creditor as an absentee, who, in a suit against the property mortgaged, may cause a curator *ad hoc* to be appointed to represent the absentee, with whom proceedings can be conducted contradictorily, and a valid judgment rendered against him.  
*Samory v. Montgomery*, 333.
4. A non-resident is entitled to an appeal within two years from the date of the judgment of the lower Court.  
*Ibid.*
5. Where a party takes an appeal, as an absentee within two years, but more than one year from the date of the judgment appealed from, he cannot, after the appeal is granted, claim to be a resident for the purpose of defeating the judgment of the lower Court, rendered in conformity with the proceedings authorized by law, against absentees and non-residents.  
*Ibid.*

SEE CURATOR AD HOC—*Frost v. McLeod*, 80.

## ADMIRALTY.

1. The Civil Courts of Louisiana are without jurisdiction in admiralty and maritime cases.  
*Berwin v. Steamship Matanzas et al.* 384.

ADMIRALTY (*Continued.*)

2. By the judiciary act of 1789, chapter 20, § 9: *Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is vested in the District Courts of the United States, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."* *Ibid.*
3. The saving clause, in the judiciary act of 1789, securing to suitors a common law remedy, where the common law is competent to give it, does not give them a remedy at common law, but a common law remedy. A proceeding *in rem* is a civil law remedy, and when used in the common law Courts is provided for by statute. *Ibid.*

## AGENCY.

1. An insolvent, after his surrender, cannot maintain an action against a faithless agent or mandatory. Such action, and the right to maintain revocatory actions, pass to the syndic, and can be maintained by him alone for the benefit of the creditors.  
*Bank of Louisiana, in liquidation, v. Wilson, 1.*
2. If an agent exceed his powers, and loss ensue therefrom, it will fall on him, unless the principal subsequently ratify, and recognize his departure from the letter of his instructions.  
*Merritt v. Wright, Williams & Co., 91.*
3. An agent having charge of cotton purchased, is bound to exercise a prudent care over it, and preserve and ship it to his principal, but he is not responsible against an overpowering force, whereby the cotton is destroyed, and ruinous loss occurs.  
*Clark & Thienman v. Norwood et al. 116.*
4. A lease signed by an agent can have no effect as proof, until the agency is shown by evidence of equal dignity.  
*Humphreys et al. v. Browne et al. 158.*
5. An agent authorized to endorse notes in the name of his principal, and for his use, having endorsed a note in his name, is presumed to have done so for the use of the principal.  
*Kock v. Bringier, 183.*
6. If a party is capacitated to act for himself, he may act in the capacity of agent for another.  
*Lea v. Bringier, 197.*
7. Defendant, being indebted to plaintiff, gave several orders on different parties for sugar and molasses, as security for the payment of the indebtedness, which, if not redeemed in twenty days, were to become his property: Plaintiff placed the orders in the hands of his agent, with instructions to recover the amount of the indebtedness within the twenty days. After the expiration of the twenty days, the agent accepts payment on the orders, at different times, in small amounts, with the knowledge and consent of the principal: *Held*—That this is a ratification of the acts of the agent, binding on the principal.  
*Delaney v. Levi, 251.*



AGENCY (*Continued.*)

8. An agent cannot bind his principal on a promissory note, under a general power of attorney. To bind the principal on the note the power of the agent must be express and special. C. C. 2966.

*Robertson v. Levi et al.* 327.

9. Where an agent, holding a power of attorney to sign promissory notes, executes a note as agent for a bill of goods, and the principal promises to pay the note, thereby ratifying the act of his agent, he cannot afterwards avoid payment on the ground that the act of the agent was not within the scope of the agency.

*Meyers v. Simmons*, 370.

10. An agent or mandatory, intrusted with the management and control of real estate here for his principal, who resided in one of the Northern States before and during the late war, was not absolved from his obligations to his principal by the breaking out of hostilities between the two sections of the country. The agency continued during the war, and his acts, as such, were binding on his principal.

*Monseaux et al. v. Urquhart et al.* 482.

11. The doctrine that a state of war dissolves or suspends all commercial partnerships existing between citizens or subjects of the belligerents, does not apply to agent or agencies.

*Ibid.*

SEE ATTORNEY—*Ealer v. McAllister & Co.*, 21.

## ALEATORY CONTRACTS.

1. Plaintiff garnishees \$3,000 belonging to defendant, which has been deposited with a third party, pending the issue of a horse race; afterwards an intervenor claims the money, as having won it at the race. Defendant is shown to have been an insolvent at the time of seizure. The Court will not sustain the intervention.

*St. Ceran v. Sherman*, 192.

## ALIMONY.

1. No greater alimony will be granted a bastard child than is shown to be necessary for its support. Should a larger sum become necessary, it is within the province of the Probate Court to grant it.

*O'Gara v. Riddell*, 504.

2. In a suit for a divorce, an order giving alimony to plaintiff was granted *ex parte*, and without legal notice to the defendant, the husband of plaintiff, and without any proof of the facts, the judicial knowledge of which was essential to the exercise of a sound, legal discretion: *Held*—That the order would work an irreparable injury to the defendant.

*Madden v. Fielding*, 505.

## APPEAL.

1. The appeal will not be dismissed on the ground that the appeal bond was given in favor of the wife, the surviving partner in community, as tutrix to her minor children, and not in her own right. The tutrix is *ex officio* administratrix of the estate, and the judgment appealed from is the property of the estate; so is the appeal bond.

*Bronson et al. v. Balch, Warden et al.* 39.

APPEAL (*Continued*)

2. When an appeal is taken from an interlocutory order, in an appealable case, and the parties are before the Supreme Court, it is not incumbent upon them to dismiss the appeal *ex officio*, even though it is not shown that an irreparable injury will be done.  
*Mason, Administrator, v. Nutt, 41.*
3. Where an appeal bond is given in a case not mentioned in the order of appeal, the appeal will be dismissed. The order must state clearly from what case the party wishes to prosecute his appeal.  
*In the Matter of the Sheriffalty of Pointe Coupée, 73.*
4. The Supreme Court will not dismiss an appeal on motion of appellant, without consent of appellee. *Wolfe v. Poirier et al. 103.*
5. Where judgment was signed in the February term, and an appeal was taken at the May term following, and the appellee not cited, the appeal will be dismissed. Citation is essential.  
*McKowen v. Atkinson et al. 136.*
6. Where a judgment has been rendered by the lower Court against two defendants *in solido*, and only one of the defendants is mentioned in the appeal bond, the appeal will be dismissed.  
*Cotton v. Stirling et al. 137.*
7. All the parties interested that a judgment shall remain undisturbed, must be made parties to any appeal taken from it, or the appeal will be dismissed; and this rule applies to warrantors interested in the suit.  
*Hutchinson v. Johnson, 141.*
8. Where an appeal is granted by motion in open Court, the names of the appellees must be inserted in the appeal bond, otherwise the appeal will be dismissed.  
*Michael v. Babin et al. 197.*
9. Where the certificate of the clerk of the District Court does not show that the record contains all the evidence adduced, and the record contains no statement of facts, no exception to the opinion of the Judge, nor special verdict, and the appellant has not filed in the appellate Court an assignment of errors of law apparent on the face of the record, the case cannot be examined on its merits, and the appeal will be dismissed.  
*City of Carrollton v. Magee et al. 261.*
10. A motion to dismiss an appeal, made more than three judicial days after the filing of the record, comes too late.  
*Boutte et al. v. Maillard et al. 276.*
11. Where the amount in controversy is less than three hundred dollars, the Supreme Court will dismiss the appeal *ex officio*. *Ibid.*
12. Plaintiff enjoins an order of seizure and sale sued out by defendant. The injunction is dismissed on a rule taken by defendant, and plaintiff appeals without making the surety on his injunction bond a party to the appeal: *Held*—That the surety is a party to the suit, having an interest that the judgment appealed from remain undisturbed, and should be made a party to the appeal.  
*Bethancourt v. Stephens, 291.*

APPEAL (*Continued.*)

13. Where the record of appeal shows that the judgment of the lower Court was not signed, the appeal will be dismissed. *Ibid.*
  14. A motion to dismiss an appeal, because the transcript does not contain certain evidence, will not be maintained, where the transcript does not show that such evidence was adduced. *Ibid.*
  15. The plaintiff died while the suit was pending in the lower Court. The widow, in her own right, and as tutrix to her minor child, and the other children as heirs, were made parties to the suit, and judgment was rendered in their favor. Defendant appeals, and gives bond in favor of the widow in her own right, and as tutrix of her minor children, naming not only the minors but those of age: *Held*—That the children of age were not made parties to the appeal. *Twitchell v. Avegno*, 294.
  16. The Supreme Court will take no notice of documents not making a part of the record of appeal. *Ibid.*
  17. Where a judgment is rendered against the members of a commercial firm *in solido*, and one member of the firm alone appeals, the other members must be made parties thereto. *Tupery v. Lafitte and Deffarge*, 296.
  18. It is immaterial when a motion is made to dismiss an appeal for want of proper parties, as, for that cause, it will be *ex officio* noticed by the Court. *Ibid.*
  19. To entitle a party to an appeal it must be shown that he has an interest in maintaining or reversing the judgment of the lower Court. *Arrowsmith v. Rappelge et al.* 327.
  20. No damages will be allowed on appeal, except on moneyed judgments. C. P. 907. *Ibid.*
  21. Where the transcript of appeal does not show that a final judgment has been rendered in the lower Court, the appeal will be dismissed. *Bynum v. Hamilton et al.* 446.
  22. Where an order for a suspensive appeal, fixing the amount of the bond as the law directs, is granted from a judgment for twenty-nine hundred and fifteen dollars and ten cents, and the bond is given for five hundred dollars: *Held*—That neither a suspensive nor a devolutive appeal can be maintained. *Succession of McCall*, 507.
  23. To maintain an appeal as either devolutive or suspensive, the bond must be for the sum fixed by the Judge or by the law. *Ibid.*
  24. Any amendment of the judgment of the Court below must be prayed for in the answer to the appeal; otherwise, it will not be noticed by the Supreme Court. *Lynn v. Lowenthal*, 527.
- SEE ABSENTEE—*Samory v. Montgomery*, 333.  
 SEE ALIMONY—*Madden v. Fielding*, 505.  
 SEE PRACTICE—*Blanchard v. Lucz*, 46.  
       “      “      *Police Jury v. Garrett*, 122.  
       “      “      *Montgomery v. Barrow*, 169.

## ARREST.

1. In order that a creditor may maintain a writ of arrest against his debtor, the creditor must swear that the debt or damages which he claims is really due to him, and the amount thereof, and that the debtor is about to remove from the State without leaving sufficient property in the State to pay his debt. He must, besides, execute his bond in favor of the debtor, in a sufficient amount to cover the damages, which he might sustain from the wrongful issuance of the writ of arrest. C. P., Art. 214, and amendments.

*Graham v. Noble*, 512.

2. The 3d section of the Act of the Legislature of 1855, (p. 42) placing resident and non-resident debtors on the same footing, as to the prerequisites for an arrest, is not repealed by the act of 1856, (p. 80) amending and re-enacting Article 214 of the Code of Practice.

*Ibid.*

3. The Act of 1856, only prescribes an additional condition for the arrest of both resident and non-resident debtors.

*Ibid.*

## ASSESSMENT.

1. By an Act of the Legislature, approved March 15th, 1855, to regulate corporations generally, the officers of each insurance company are required to publish annually a full statement under oath of the business of the company, etc.; and, on the estimate thus made and published, the assessor is authorized to make his assessment for the year.

*State v. Louisiana Mutual Ins. Co.*, 474.

2. A party objecting to the assessment roll on the ground that it is incorrect, must resort to the mode pointed out by law, and within the time prescribed, to have it corrected; otherwise, he will be bound by it.

*Ibid.*

3. Where the tax-payer omits to furnish the assessor with a statement of his property taxed in the manner and within the time prescribed by law, the assessor is authorized and required to make the assessment from the best information he can obtain.

*Ibid.*

## ATTACHMENT.

1. An absentee having property in the State, or within the jurisdiction of the Court, liable to seizure by his creditors, may be brought into Court by a curator *ad hoc*, without attaching his property.

*Field & Co. v. New Orleans Delta Newspaper Co.*, 36.

2. The process of attachment is one mode by which the creditor may pursue his debtor, in the cases specified by law, but is not exclusive. In cases where the absent debtor leaves his property without an administrator or agent, the creditor may cause him to be cited through a curator *ad hoc*, and a judgment rendered contradictorily with the curator *ad hoc*, in such cases, is binding on the absent debtor.

*Ibid.*

ATTACHMENT (*Continued.*)

3. A writ of attachment will not be maintained, where the party left the State temporarily, on account of the political agitation prevailing here at the time, and it is not shown that he has established a domicile elsewhere. *Clark v. Pratt*, 102.

4. A residence in this State of one year is not required in order to protect defendant's property from attachment.

*Lurty v. Skilton*, 136.

## ATTORNEYS AND ATTORNEYS' FEES.

1. Where an attorney-at-law brings a suit in his own name, as principal and owner: *Held*—That he cannot recover counsel fees as the agent of another. He cannot, in the same proceeding, claim to be the owner and the agent of the owner of the same thing.

*Ealer v. McAllister & Co.*, 21.

2. An attorney has no authority to release his client's debtor, except on payment in the legal currency of the United States.

*Railey & Campbell v. Bagley et al.* 172.

3. Where an attorney-at-law has rendered services in his professional capacity to an estate, and the universal legatee has agreed to pay him a certain amount agreed upon, and makes a partial payment in liquidation thereof, the attorney may sue on this acknowledgment, and recover the balance against the succession. In such a case, the defendant representing the estate, cannot successfully urge the plea of *res judicata*, where the amount first paid has been placed on the tableau, and a judgment rendered allowing his claim which has been paid.

*Duplantier v. Michoud*, 530.

4. Where the executor files an account of his administration, and places the attorneys for the estate on the tableau for a certain amount, as the value of their services to the succession during its administration, and other creditors oppose the homologation of the items for attorneys' fees, on the ground that the charges are excessive, and the evidence shows that the attorneys have received large amounts from the succession for professional services prior to the filing of the account, the amounts thus received must be deducted from the amount placed on the tableau to the credit of the attorneys.

*Succession of Fink*, 258.

SEE CONFEDERATE TREASURY NOTES—*Garthwaite*,

*Wheeler & Co. v. Wentz et al.* 196.

## BANKRUPTCY.

1. The exercise by Congress of the constitutional power, vested in them to establish a uniform system of bankruptcy, repeals the insolvent laws of each particular State.

*Meekins, Kelly & Co. v. Their Creditors*, 497.

2. The United States bankrupt law does not, however, divest the State Courts of the jurisdiction necessary to the final administration of the estate of an insolvent who had made a surrender previous to its passage.

*Ibid.*



## BILLS AND PROMISSORY NOTES.

1. A forged endorsement on a negotiable bill of exchange passes no title to it, even to an innocent endorsee, and the holder can recover the amount from the drawer, without alleging and proving the payee's endorsement. *Foltier v. Schroder & Schreiber*, 17.
2. It is a well-settled principle of law, that an action can only be maintained on notes or obligations by those in whom the legal title is vested. *Ibid.*
3. When a bill of exchange is made payable to plaintiff, or order, the title to it is in him, and, to divest him of it, a transfer from him or his endorsement is necessary. *Ibid.*
4. Notice of protest, enclosed in a letter addressed to the endorser, sent by mail to a post-office in the parish of his residence, is a good notice, in the absence of any proof that there was another post-office nearer to his residence. *Gallogher v. Tyson*, 35.
5. Where the mail service, between two points, is suspended or broken up, a notice of protest deposited in the post-office by the notary at one place, addressed to an endorser who resides in another, is not good; the post-office affords a safe means of conveyance, but not a legal place of deposit for notices. *Citizens' Bank v. Pugh*, 43.
6. Notice of protest, addressed to the endorser, sent by mail, must be addressed to the nearest post-office to his residence, unless it is shown that he is in the habit of receiving his letters and newspapers from one more distant. *Ibid.*
7. The Acts of the Legislature of 1827 and 1855, do not change the general commercial law, in regard to the diligence to be used in serving notices of protest; these acts merely provide a new mode of proving such diligence. *Ibid.*
8. Where the mail service cannot be used as a means of conveying notice, the holder of commercial paper is not excused, if he does not use all other practicable means of bringing home notice to the party whom he wishes to charge. *Ibid.*
9. The plea of prescription of five years, on a promissory note, will be maintained when the evidence shows no interruption for that length of time. *White et al. v. Blanchard et al.* 59.
10. Where the holder of a promissory note seeks to bind the endorser, it must be shown that due diligence has been used in making demand, and giving notice; and the impossibility of giving notice at an earlier date. *Harp v. Kenner*, 63.
11. Demand of payment should be made upon the very day a note becomes due. Any inevitable accident, irresistible force or unforeseen occurrence, which could not be provided against, is a sufficient excuse for non-presentment. It must, however, be patent, real, and as a natural consequence. An excuse arising from such a cause, *vis major*, must also disappear with it. *Jex v. Tureaud*, 64.

BILLS AND PROMISSORY NOTES (*Continued.*)

12. It is not necessary that demand be made, nor that notice of dishonor be given, by a notary. These requisites may be performed by any person, lawfully in possession of a note, and competent to testify as a witness. *Ibid.*
13. When payment of a promissory note cannot be demanded at the time and place of its maturity, a demand should be made as soon after as practicable. *Ibid.*
14. By the President's proclamation of March 31st, 1863, commercial intercourse was interdicted until May, 1865. *Ibid.*
15. Promissory notes being the property of a succession, and two months having elapsed from the restoration of commercial intercourse between the sections, in which the several parties resided, before the appointment of an administrator: *Held*—That neither demand nor notice is required until reasonable time after the appointment of an administrator. *Ibid.*
16. In a suit on a promissory note, where the defendant pleads that the consideration was money loaned to a third party, he is not entitled to have that third party called in warranty.  
*Hackett v. Schiele et al.* 67.
17. If presentment of a promissory note cannot be made at maturity, on account of irresistible power, the holder will not be deprived of his right against other parties, provided he makes presentment and gives proper notice, within a reasonable time after he has the power to do so. The holder is never bound to an impossibility.  
*Union Bank of Tennessee v. Robertson et al.* 72.
18. In order to bind the drawer or endorser of a draft, the evidence must show that a demand has been made in due time.  
*Vanwickle v. Downing*, 83.
19. To bind the endorser on a promissory note, notice of demand or non-payment must be shown. Notice left at the bank where the note is made payable is not notice to the endorser, unless it is shown that it reached him in a reasonable time, or an effort was made to serve it on him.  
*Greves v. Tomlinson et al.* 90.
20. It is not incumbent on plaintiff to prove the signatures of the drawer and first endorser of a promissory note, when defendant is a subsequent endorser; his transfer of the note by endorsement admitted the validity of his title. *Wolfe v. Poirier et al.* 103.
21. Plaintiff commenced a suit by executory process, to enforce the payment of promissory notes secured by mortgage on real property. Defendants enjoin the sale on the ground that the plaintiff is without title to the notes. The notes bear no endorsement or assignment; in answer to the injunction plaintiff alleges a transfer to him by all parties in interest of the notes sued on: *Held*—That unless plaintiff shows a transfer of the notes, made in strict conformity to law, the injunction will be maintained.  
*Burton v. Kron et al.* 107.

BILLS AND PROMISSORY NOTES (*Continued.*)

22. Where several parties endorse a promissory note, they are not joint sureties to the holder, but each one is severally liable to him for the whole amount. *Syme v. Brown et al.* 147.
23. Notice of protest deposited in the post-office at New Orleans, La., during the time it was in the possession of rebels in arms against the Government of the United States, addressed to an endorser residing in the town of Madison, Indiana, is no notice to the endorser, the mail service between the two places being interrupted by the war. *Shaw v. Neal et al.* 156.
24. To bind the endorser, the holder should have sent the notice as soon as communication was opened between the two points. *Ibid.*
25. In the absence of any proof, the Court will presume that the endorsement was made before hostilities commenced between the United States and a portion of her citizens engaged in armed rebellion against their government. *Ibid.*
26. The want, failure or illegality of consideration, may be established by parol testimony, between the parties to the note. *Reeve v. Doughty et al.* 164.
27. Where the consideration of a promissory note is shown to be Confederate treasury notes, the Courts of this State will not enforce its payment. *Ibid.*
28. Notes endorsed in blank may be sued on by an agent or executor, having possession thereof, in his own name, and a judgment thereon will be *res judicata*. The question of ownership is unimportant, except defendant has an equitable defence against the true owner. *Ricard v. Harrison*, 181.
29. Notice of protest is properly served at the place of business of the party to whom it is addressed. *Kock v. Bringier*, 183.
30. The fact that notes are protested is not proof that the endorser thereof is insolvent. *Ibid.*
31. A general power given to the business manager of a corporation, does not authorize him to bind the corporation as drawer of a promissory note. *Culver, Simonds & Co. v. Leovy et al.* 202.
32. A promissory note is drawn to the order of two persons and endorsed by both; they are jointly liable, but are not bound *in solido*. *Ibid.*
33. Where one of a series of notes, secured by mortgage, delivered by the maker, has come again into his hands, the debt evidenced by it is extinguished by confusion. C. C. 2214. By reissuing such note, after maturity, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing it, which being only an accessory to the principal debt between the maker and the payee, is extinguished with the note. C. C. 3252, 3374. *Schinkel v. Hanewinkel*, 260.

BILLS AND PROMISSORY NOTES (*Continued.*)

34. The discharge of an endorser of a note because notice of protest was not properly served, does not release the other endorsers. The holder is only bound to notify the endorser whom he intends to hold liable. *Crane v. Trudeau et als.* 307.
35. In relation to third parties and *bona fide* holders, the obligations of accommodation endorsers are co-extensive with those of endorsers of business paper. It would be different if the transferee of a note endorsed, obtained it from the *maker*. In such a case the endorser would be a surety. *Ibid.*
36. Where no privity is shown between the parties to a note, every endorsement, whether accommodation or otherwise, is essentially an original contract, equivalent to a note in favor of the holder. *Ibid.*
37. Where the consideration of a promissory note is shown to be the sale of an African slave, payment cannot be judicially enforced. *Austin v. Sandel*, 309.
38. Where property has been sold at succession sale, and notes executed for the price, with a stipulation in the act of sale and mortgage, that the property sold remains specially mortgaged and hypothecated, with privilege of a vendor in favor of whoever may be the future holder of the notes, any future holder of the notes may obtain an order of seizure and sale of the property mortgaged, in his own name, by exhibiting the notes and act of mortgage, or, in any legal capacity, such as curator, without exhibiting letters of curatorship. *Bayly v. McKnight*, 321.
39. Where the holder of a promissory note permits a payment to be endorsed on the note in Confederate treasury notes (*an unlawful issue*) Courts will not interfere, but will leave the parties where their conduct has placed them. *Luzenberg v. Cleveland*, 473.
40. Where a party has acquired a negotiable note after its maturity, he will be protected as an innocent holder, if the immediate holder who transferred it to him took the note by endorsement *bona fide* for value before it was due. The holder of a promissory note in good faith succeeds to all the rights of the endorser under whom he holds. *Cook v. Larkin*, 507.
41. Payment of a promissory note to the holder, endorsed in blank, will discharge the drawer and endorser. *Hunt v. Stone et al.* 526.
42. Where the drawer and endorser of a promissory note seek to avoid payment on the ground that the holder is not the owner thereof, and that they have equities against the real owner, the burden of proof is on them to show the equities that exist. *Ibid.*
43. The holder of a promissory note, though he is only the agent of the owner, may sue and recover judgment in his own name. *Ibid.*

SEE AGENCY—*Robertson v. Levy*, 327.

“ “ *Meyers v. Simmons*, 370.

“ OBLIGATIONS—*Stephenson v. Mount et al.* 295.

## BONDS.

1. A bail bond taken by a justice of the peace, in a case in which he is prohibited from admitting the party to bail, is void; and the securities thereon will incur no liability.

*State v. Whitaker*, 142.

2. Where an appearance bond is not signed by the accused, he is not bound thereon; and a judgment against the surety is not valid.

*State v. Taylor et al.* 145.

SEE CONSTRUCTION, RULES OF—*Gion v. Creditors of Gion*, 81.

SEE HUSBAND AND WIFE—*Wickliffe v. Dawson*, 48.

## CITATION.

1. Where the return shows that defendant was cited by service "on Miss B. B. Simms, a white person, about the age of fourteen, residing in defendant's house: *Held*—Not to be a legal citation.

*McCracken v. Simms*, 33.

2. Citation must be addressed to the defendant in the suit, otherwise it is defective and void. Knowledge of the suit brought to the defendant in any other way, will not cure a defective citation.

*Bertoulin v. Bourgoin*, 360.

SEE HUSBAND AND WIFE—*Wickliffe v. Dawson*, 48.

## COMMERCIAL INTERCOURSE.

1. By the President's proclamation of March 31, 1863, commercial intercourse was interdicted until May, 1865. *Jex v. Tureaud*, 64.

2. Promissory notes being the property of a succession, and two months having elapsed from the restoration of commercial intercourse between the sections, in which the several parties resided, before the appointment of an administrator: *Held*—That neither demand nor notice is required until reasonable time after the appointment of an administrator. *Ibid.*

3. A contract made in 1862, between French subjects residing in France, on the one side, and persons residing within the rebel lines, and within the limits of the insurrectionary States of the United States, on the other, was not a traffic between enemies forbidden by the law of nations, the President's proclamation or the acts of Congress. *Devot & Co. v. Marx*, 491.

4. The proclamation of the President of the United States, and the acts of Congress, approved July 13th, 1861, only interdicted and prohibited commercial intercourse as unlawful, between the inhabitants of the eleven States named on the one side, and the citizens of the rest of the United States, on the other side. 12 U. S. Statutes at Large, 1862. *Ibid.*

## COMMON CARRIER.

1. The responsibility of a common carrier, in transporting slaves, is of the nature of that assumed in carrying passengers, and not packages. If loss occurs the carrier is responsible only for negligence or unskillfulness.

*Folse et al. v. N. O. Coast and Lafourche Trans. Co.*, 199.



## COMMUNITY.

1. The partnership, or community of acquets and gains, is presumed to exist between the husband and wife, when nothing is shown to the contrary, and all property acquired during the marriage belongs to that community of which the husband is the head and master. C. C. 2371, 2374. *City Insurance Co. v. Lizzie Simmons, et al.* 249.
2. During the existence of the community of acquets and gains, between T. L. King and his wife, he purchased immovable property, and put the same as stock into a partnership of which he became a member. After the dissolution of the community, by the death of Mrs. King, the property was sold on execution for the debts of the partnership; and the heirs of Mrs. King bring suit for her community interest therein: *Held*—That T. L. King, as the head and master of the community, had the right to put the acquets and gains as stock in the partnership; by so doing, it became the property of the partnership, and specially liable for its debts; and a forced sale thereof to pay them, divested whatever title the community had in said property.

*Carpenter v. Featherston & Amis*, 508.

SEE EXECUTORS AND ADMINISTRATORS—*Bronson v. Balch*, 39.

SEE HUSBAND AND WIFE—*Beigel v. Lange*, 112.

## COMPENSATION.

1. Compensation takes place where the demand of plaintiff and defendant are equally liquidated. C. C. 2205. C. P. 368.  
*Hope v. Howard*, 465.
2. Where the law authorizes the plea in compensation to be made, evidence is admissible to establish the demand. *Ibid.*

## CONFEDERATE OBLIGATION.

SEE CONTRACTS—*Bowman v. Gonegal*, 328.

“ “ *Platt v. Maples*, 459.

SEE JURISDICTION—*Wright v. Stacy*, 449.

## CONFEDERATE TREASURY NOTES.

1. Courts will not enforce a contract, the consideration of which is Confederate notes. *Hunley et al. v. Scott*, 161.
2. Where the consideration of a promissory note is shown to be Confederate treasury notes, the Courts of this State will not enforce its payment. *Reeve v. Doughty et al.* 164.
3. The plea of a tender of payment in Confederate money will not avail defendant, although it was the circulating currency at the time. *Graves v. Hardesty & Harris*, 186,

CONFEDERATE TREASURY NOTES (*Continued.*)

4. Plaintiffs obtained judgment against defendant, and others, in 1861; afterwards plaintiffs' attorney acknowledged satisfaction thereof, on receipt of the amount in *Confederate money*: Held—That the attorney had no right to receive such paper in payment of his clients' judgment, without their consent, and that the judicial mortgage must be reinstated of record.  
*Garthwaite, Wheeler & Co. v. Wentz et al.* 196.
5. Where the consideration of a promissory note is shown to be Confederate treasury notes, payment will not be enforced by our Courts. The principle is now definitely settled in our jurisprudence, that the issue of Confederate treasury notes was illegal, and all obligations and contracts founded on them are absolutely null and void.  
*Huck v. Haller & Brother*, 257.
6. A party to a contract, the consideration of which is Confederate treasury notes, cannot recover thereon. *Washburn v. Offut*, 269.
7. A contract, the basis of which is Confederate notes, will not be enforced.  
*King v. Huston, Hubbell & Co.*, 288.
8. The late so-called Confederate States never reached the dignity of a *de facto* Government, and, consequently, were without the legal right to coin money or emit bills of credit, or authorize their circulation as a medium of exchange. *McCracken v. Poole*, 359.
9. The issuing of Confederate treasury notes was an act of rebellion, in palpable violation of law, and contracts growing out of the use of these notes, as a medium of exchange, cannot receive judicial sanction.  
*Ibid.*
10. Confederate treasury notes were issued in violation of law, and used for the purpose of overthrowing the Government of the United States. Courts of Justice will not lend their aid to give effect to contracts, the consideration of which are illegal and reprobated by law.  
*Howard v. Kirwin*, 432.
11. Confederate Treasury notes were issued to assist the rebellion against the Government of the United States, and the circulating them as money was immoral and against public policy. Parol evidence is admissible to vary or contradict a written contract that is reprobated by law,  
*Norton v. Dawson et al.* 464.
12. Where defendants sold goods for account of plaintiff, and received in payment Confederate notes, without plaintiff's authorization to do so, they will be liable to him for the proceeds of the sale in legal currency.  
*Thomas v. Thompson & Barnes*, 487.

SEE ATTORNEY—*Railey & Campbell v. Bagley et al.* 172.

SEE BILLS AND PROMISSORY NOTES.—*Luzenberg v. Cleveland*, 473.

SEE JURISDICTION—*Windham v. Ceryf*, 498.

## CONSTRUCTION, RULES OF

1. Judicial bonds must be construed with reference to the law under which they are given.

*Guion v. The Creditors of the Succession of Guion*, 81.

2. Judgments must be interpreted by the pleadings and the nature of the obligation sued upon. Garnishees sued as ordinary parties, cannot be condemned *in solido*: solidarity is never presumed.

*McKinbrough v. Castle et al.* 128.

## CONTRACTS.

1. Where a party contracting with the city of New Orleans to clean the streets, allows to be inserted in the contract a clause, that in case of failure to perform the work specified, at the proper time, the street commissioner shall cause the work to be done at whatever cost he may be able to obtain the labor and material, and to deduct the expense thus incurred from the amount due by the city to the contractor, such clause is valid and binding upon said contractor.

*Rossvally v. City of New Orleans*, 7.

2. In an action on a *quantum meruit*, the defendant may show that there was a verbal or written contract between the parties; and if a contract really existed, the plaintiff, who sues on a *quantum meruit*, cannot recover.

*Willis v. Melville*, 13.

3. When an obligor, from inevitable accident or irresistible force, cannot perform one of two things, either of which at the time of his engagement he had the option to do, he is not relieved from the obligation to perform the other.

*Jacquinet v. Boutron*, 30.

4. When two parties enter into a contract with a third, and neither a commercial partnership nor a solidary obligation is shown, judgment cannot be rendered *in solido*.

*Turnage v. Wells et al.* 135.

5. Plaintiff brought suit for the price of salt purchased by defendant in 1862; defendant pleads that the salt was for the Confederacy, and that Courts of justice should not enforce the contract. There being a doubt of plaintiff's knowledge of the unlawful purpose of defendant, the Court will presume him to be innocent.

*Fee v. Gonegal*, 263.

6. The defendant cannot take advantage of his own unlawful acts to annul his contract.

*Ibid.*

7. A contract was entered into, during the existence of the late war, between defendant, residing in the city of New Orleans, after the occupation of the city by the Federal forces, with John J. Pettus, then Governor of Mississippi, one of the so-called Confederate States, for the supply of the so-called Confederates, with a large quantity of salt and other goods, in exchange for cotton and other produce: Held—That the contract so made is illegal on its face, absolutely null and void, and cannot be judicially enforced.

*Bowman v. Gonegal*, 328.

CONTRACTS (*Continued.*)

8. A contract must have a lawful purpose, and if it have an unlawful cause—if it be contrary to good morals or public order, it can have no effect. *Ibid.*
9. Where one renders services beneficial to another at his request, an implied contract is raised for remuneration. The law does not allow one person to enrich himself at the expense of another. *Beall v. Van Bibber*, 434.
10. Where the consideration of a contract is unlawful on its face, it cannot be ratified, so as to authorize the Courts to enforce it. A contract of sale is incomplete until the delivery of the thing sold. C. C. 2450. *Platt v. Moples*, 459.
11. Steamboats and other water-crafts, navigating the waters of the United States, are prohibited by act of Congress from transporting freight or passengers, without first obtaining the necessary license or inspection papers from the collector of customs. Contracts of insurance of affreightment, made with any steamboat navigating any of the waters of the country in direct violation of law, are null, and cannot receive judicial sanction. *Benton v. Hope & Tully*, 463.

## CORPORATIONS.

1. By the decree of forfeiture, the corporation loses the faculty of suing in its corporate name. *Bank of Louisiana v. Wilson*, 1.
2. Where the charter of an incorporated company has fixed the qualification of voters, by declaring that each share of stock shall be entitled to one vote, which may be cast by the stockholder in person or by proxy, any vote or votes cast by a party at any election of the corporation, without the qualifications named, is null and void, and the election will be declared and enforced without counting such votes. *Monseaux et al. v. Urquhart et al.* 482.
3. The right of voting, conferred by the charter, is not to be tested by the mere ownership of stock, but the transfer of it must be patent on the stock-book. *Ibid.*
4. Where stock of the company stands on the books in the name of an individual, as president, and has not been transferred by him on the books of the company, he has no right to vote on it, or for it, at any election. *Ibid.*
5. Stock, or shares standing on the books of the company, in the name of the corporation itself, cannot be voted for by one of its officers. *Ibid.*

SEE BILLS AND PROMISSORY NOTES—*Culver, Simonds & Co.*  
v. *Leovy*, 202.

## COSTS AND FEES.

1. Clerks of Courts and sheriffs have the right, every six months after a suit has been instituted in any of the Courts of this State, to demand their costs from the plaintiff, and after authenticating the

COSTS AND FEES (*Continued.*)

amounts due, to issue execution for the collection of them; this right is accorded to no other officer of the State. Revised Statutes, p. 124, § 7. *New Orleans, praying for Expropriation*, 382.

2. Experts, auditors and judicial arbitrators, are to be paid as well as the taxed cost, by the party cast at the termination of the suit. *Ibid.*

SEE PRACTICE—*Duplantier v. Wilkins*, 112.

## CRIMINAL LAW.

1. The charge of "enticing away from deponent, H. E. Moore's plantation, certain freedmen laborers," is not an offence known to our law. *State v. Sypher and Petit*, 71.
2. Where an indictment is found more than a year after the alleged committing of a crime, other than willful murder, arson, robbery, forgery and counterfeiting, to be valid it must allege upon its face facts that will negative prescription. *State v. Bilbo*, 76.
3. Where more than one year intervenes between the commission of the offence (willful murder, arson, robbery and counterfeiting excepted,) and the finding of the grand jury, the facts which interrupt prescription must be set forth in the indictment, otherwise the prosecution must fail. *State v. Peirce et al.* 90.
4. A justice of the peace, before whom a party is brought for examination, cannot admit him to bail if the crime of which he is accused be punishable with death, or with seven years' or more imprisonment at hard labor. Revised Statutes, 148-9, sec. 82. *State v. Whitaker*, 142.
5. Where a party has been arrested in one parish, charged with an offence committed in another, it is the duty of the magistrate to commit him to prison until he can be transferred to the parish where the offence is alleged to have been committed, and a bond taken by the magistrate whereby the party is released from prison, is unauthorized and void, and the sureties cannot be held. Revised Statutes, page 167, § 49. *State v. Collins*, 145.
6. In cases of conviction of the crime of libel, the law authorizes punishment by fine or imprisonment, or both, at the discretion of the Court. Acts of 1855, sec. 21. *State v. Butman*, 164.
7. Where the Judge has limited his sentence to a fine, he cannot imprison more than twelve months in default of payment of the fine. Acts of 1855, sec. 4. *Ibid.*
8. It is sufficient, to establish the forgery of a check and the signature thereto, to show a similarity between the spurious check and the genuine one, such as to create a possibility of fraud. *State v. Dennett*, 395.
9. The statute of Louisiana introduced no change in the common law, as to the distinctions in degrees of insanity; it merely directed the action of juries, in a case where a prisoner, upon the general issue of not guilty, was acquitted for that cause. *Ibid.*



CRIMINAL LAW (*Continued.*)

10. A bill of indictment for larceny will not lie, unless brought within one year after the offence shall have been made known to the officer having the power to direct the investigation.  
*State v. Bryan*, 435.
11. The indictment must negative prescription apparent on its face, by alleging either, that the crime was not discovered within the year, or that the prisoner absconded or fled from justice. *Ibid.*

SEE JURIES AND JURORS—*State v. Vegas*, 105.

## CURATOR AD HOC.

1. In proceedings for sale of land for taxes, the act of 1858 does not authorize the appointment of a curator *ad hoc* to represent the unknown owner, where the owner had died and a curator to his estate had been appointed.  
*Gernon v. Handlin*, 25.
2. Where an order of seizure and sale has been obtained on a mortgage, and the debtor who granted the mortgage is absent from, and not represented in the State, the law does not require antecedent proof or affidavit of his absence, before an attorney can be appointed to represent him.  
*Frost v. McLeod*, 80.

SEE ABSENTEE—*Field & Co. v. N. O. Della New's*, Co. 36.  
“ “ *Samory v. Montgomery*, 333.

## DAMAGES.

1. Where defendant shows that cotton was damaged before he was authorized to take possession of it, it is incumbent on plaintiff to show that other damages were sustained, and the extent thereof, before he can recover.  
*Farley, Jury & Co. v. Vanwickle & Co.*, 9.
2. In an action of damages plaintiff must put defendant in default before he can recover. In commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party wishing to put the other in default, must, at the time and place expressed, or implied, by the agreement, offer or perform, as the contract requires, that which, on his part, was to be done, or the other party will not be legally put in default.  
*Provosty v. Putnam*, 84.
3. As a prerequisite to recovery of damages for violations of a commutative contract, the defendant must have been put in default.  
*Ibid.*
4. Where plaintiff bought cotton of defendant, to be delivered at a certain place, but no time mentioned, he could refuse its immediate delivery. But no claim for damages will be sustained against defendant on account of the non-delivery of the cotton, without proof of his being put in default.  
*Pratt v. Craft*, 130.
5. The charge against plaintiff that he had sworn falsely, and the calling him a swindler and thief, amount to a presumption of damage.  
*Mallerich v. Mertz*, 194.

DAMAGES (*Continued.*)

6. Plaintiff shipped at New Orleans, December 18th, 1860, as pilot on the *Fulton*, bound on a voyage to Bayou Maçon; at Dunn's landing he voluntarily left the boat, in consequence of being told by the captain that wages would be stopped while the boat remained at that point: He has no action in damages nor for services beyond the time actually employed, he not having put defendant in default.

*Patterson v. Steamer Andy Fulton et al.* 178.

7. In a question of damages, where private property is taken for public use, and the testimony is so conflicting, that from it the Court is unable to do justice between the parties, the case will be remanded to the Court of the first instance, in order that the *quantum* of damages may be ascertained by a jury of free holders. C. C. 2608.

*Bailey v. New Orleans*, 271.

8. No damage can be recovered by plaintiff on account of the collision of steamboats, if, by his fault, negligence or mismanagement, he has contributed to the collision: If the collision be the result of accident, the one in fault must bear the whole loss.

*Kellogg et al. v. Steamboat T. D. Hine et al.* 304.

9. Malicious slander will be punished by the infliction of damages commensurate with the aggravated character of the language used. The doctrine in the case of *Mohrman v. Oshe*, 17 A. 64, reaffirmed.

*Bonnin v. Elliott*, 322.

10. In actions for quasi offences the law has left a discretion to the Court and jury to assess the damages.

*Pike & Co. v. Doyle & Co.*, 362.

11. Damages cannot be allowed defendant, as attorney's fees, where the judgment is in favor of plaintiff.

*Levy & Dieter v. Baer*, 468.

12. Where a party brings suit for the possession of property unlawfully taken away from him, with a claim for damages for such unlawful detention, the Court will restrict the judgment for damages to the amount actually proved. *Means et al. v. Hyde & Mackie*, 478.

## DOMICILE.

1. Defendants had their domicile and residence in one parish, where they had resided for a number of years, from which they removed temporarily to another parish, to avoid the dangers resulting from the late war, where they engaged in business, and participated in one or two elections by voting, without doing any other act, or signifying their intention of a change of domicile: *Held*—That these acts, of themselves, are not sufficient to cause a change of domicile, and the parties must be considered as still residing at their former domicile, where they must be sued.

*Folger & Son v. Slaughter et al.* 323.

SEE PRACTICE—*Griffin, Smedes & Co. v. Manning*, 204.

## EMANCIPATION.

1. Under the Constitution and laws of the United States and of Louisiana, the Courts can render no decree recognizing property in man. *Whitehead et al. v. Watson et al.* 68.
2. The sale of a negro woman as a slave, after the adoption of the Constitution of 1864, is an absolute nullity. *Fenn et al. v. Carr*, 106.
3. The Emancipation Act of the sovereign power necessarily annulled the laws under which contracts relating to the ownership of slaves were previously enforced. *Wainwright v. Bridges et al.* 234.
4. The status or condition of slavery derived its existence from the laws which sanctioned it. The change of the status involved the abrogation of the law which gave it; for emancipation and the existence of law tolerating that condition are incompatible. *Ibid.*
5. The amendment of the Constitution, emancipating slaves, destroyed, in some instances, liens granted to secure the enforcements of contracts relative to slaves; but the language of the amendment does not show that the sovereign designed and intended the extraordinary deed of *destroying valid contracts*. The amendment only freed the servant from his master, and destroyed liens granted on him. *It did not change or destroy the master's obligations under his contract.* (HYMAN, C. J., concurring) *Ibid.*
6. Freedom, it has been properly held, was a pre-existing right; slavery, a violation of that right. Titles to slaves, would, therefore, seem to be vitiated *ab initio*. *Ibid.*

## EVIDENCE.

1. Where plaintiff has established his ownership up to a particular date, the burden is on defendant, or those through whom he holds, to show a legal divestiture of plaintiff's title. *Sullivan v. Goldman*, 12.
2. Evidence is admissible to prove that an attorney is in the building in which the Court sits—it being the custom of the Court to send the crier to notify the attorney, if he is not in the court-room when the case is taken up. *Gernon v. Handlin*, 25.
3. The prohibition of parol evidence, against or beyond the contents of an act, only extends to the persons who were parties to it. *Blake v. Hall*, 49.
4. In case of an insolvent estate, the oath of the several parties creditors is *prima facie* proof, as required by law, to entitle such creditors to vote in the election of a syndic. *Ibid.*
5. In a suit upon an open account, composed of distinct contracts, not exceeding five hundred dollars each, one witness to each item is sufficient, although the aggregate amounts to more than five hundred dollars. *Stribling v. Stewart*, 71.

EVIDENCE (*Continued.*)

6. Where plaintiff seeks to hold the drawer and endorser of a draft responsible on a subsequent promise, he must show by evidence that the defendant knew, at the time he made the promise, that he was released from liability by the laches of the plaintiff.

*Vanwickle v. Downing*, 83.

7. A commercial partnership being plaintiffs in a suit, and a commission to take testimony issuing after the death of one member of the partnership, and before his representatives had been made parties to the suit: *Held*—That the testimony should be admitted; the representatives alone have the right to object.

*Roth & Deblieux v. Moore*, 86.

8. A party cannot avail himself of his own letters, as evidence, unless the letters have been called for by the opposite party to establish some fact against him. *A fortiori*, their contents cannot be proved by parol.

*Merritt v. Wright, Williams & Co.*, 91.

9. The testimony shows that Downing, a merchant in Vicksburg, received from plaintiffs a draft on defendants, Wright, Williams & Co., of New Orleans, and forwarded it to them with a letter written by himself; that he copied the letter into his letter-book, and, subsequently, sent the letter-book to defendants, and they are now in possession of the letter, and the letter-book, and have failed to produce them on demand: *Held*—That on a foundation thus broad, the plaintiffs are entitled to prove the contents of the missing letter by parol, and in connection therewith to show the copy from the letter-book.

*Ibid.*

10. It devolves on the party objecting to testimony to state the particular grounds upon which its introduction is resisted.

*Bogan v. Finlay et al.*, 94.

11. Where a judgment of separation of property between the husband and wife is made the basis of an injunction suit by the wife, the judgment is admissible in evidence to prove *rem ipsam*; but, where the defendants in their answer attack the validity of the judgment, as fraudulent and collusive, it will produce no legal effect unless its genuineness is established by other legal evidence.

*Ibid.*

12. Where the evidence shows that the Citizens' Bank was in the habit of paying in Confederate treasury notes, or notes of the local banks, at the option of persons presenting checks for payment, the Court will not presume that the payment of a particular check was made in Confederate treasury notes.

*Clark & Thieneman v. Norwood et al.*, 116.

13. A party bringing suit on an unliquidated demand must establish his claim with legal certainty.

*Carver & Co. v. Harris*, 121.

14. Plaintiff enjoins a seizure under a writ of *fiery facias* on the ground that he is the owner and possessor of the property seized, and the judgment creditor, in answer to the injunction, avers that the act of sale on which plaintiff claims the property seized, is fraudulent and simulated: *Held*—That the party claiming the property is bound to make his title clear and certain by legal evidence.

*Corcoran v. Sheriff et al.*, 139.

EVIDENCE (*Continued.*)

15. An act *sou seing prive* has no date against third parties, except the one at which it is produced, unless the real date is shown by evidence *dehors* the instrument. *Ibid.*
16. In a suit on a promissory note by a third holder against the maker, the payee and endorser is a competent witness for the maker to prove a subsequent agreement between the maker and payee, then the holder by which the note was to be extinguished. *Nash v. East*, 165.
17. The mere fact of the witness being a party to the record, does not disqualify him as a witness. *Beebe & Co. v. Kaiser & Bryan*, 270.
18. Where testimony, taken by commission, has been improperly excluded on trial in the Court below, and is in the record on appeal, the Supreme Court will not remand the cause on that account, but will render judgment on all the evidence in the record. *Ibid.*
19. After the termination of the partnership, no admission or acknowledgment, by one of the partners, of the correctness of an account made before the dissolution of the partnership, is legal evidence against the other members of the firm. *Conery v. Hayes et al.*, 325.
20. The admission of a partner, after the dissolution of the partnership, to a third party, that an account made before the dissolution is correct, where the amount is over five hundred dollars, is not conclusive against him. C. C. 2257. *Ibid.*
21. A proposal to compromise is not admissible as evidence against the party making it, unless some fact or distinct liability is admitted in the offer. *Pike & Co. v. Doyle & Co.*, 362.
22. The evidence of witnesses, as to what they heard from or were told by others, of orders having been issued, or given by the insurgent military authorities, then in possession of the city, for the destruction of property prior to, or about the time of the loss of the ship *Pettigrew*, was properly admitted as part of the *res gestæ*. *Marey et al. v. Merchants' Mutual Ins. Co.*, 388.
23. The testimony of one witness, unsupported by corroborating circumstances, is insufficient to prove a verbal contract where the amount exceeds five hundred dollars. C. C. 2257. *Brady v. McWilliams*, 433.
24. Where the petition alleges that the defendant is executor, and he is cited in that capacity, a promissory note signed by him as executor, is admissible in evidence under the general issue. *Hays v. Compton*, 434.
25. Written evidence of a contract of sale is admissible without an allegation that the contract is reduced to writing. The law does not require parties litigant to allege that their evidence is in writing. *Brown v. Caves*, 438.



EVIDENCE (*Continued.*)

26. The Supreme Court will not look beyond the transcript of appeal to ascertain facts not therein transcribed; nor will it presume that the District Court permitted a wrong to be perpetrated on the government. *Ibid.*
27. The contents of a written instrument cannot be proved by parol evidence, without first showing the existence and loss of the written document. The best evidence in the reach of the parties should be produced. *Marks & Co. v. Winter*, 445.
28. Statements made, or letters written, by an endorser of a promissory note, after the transfer, are not admissible to defeat the action of the holder. If his testimony can be used at all, it is as a sworn witness in the case. *Dowty v. Sullivan*, 448.
29. A receipt which acknowledges payment is merely *prima facie* evidence of payment, but is not conclusive proof. *Platt v. Maples*, 459.
30. The answers of defendant to interrogatories propounded by plaintiff, can only be destroyed by the oath of two witnesses, or one witness corroborated by strong circumstantial evidence, or by written proof. C. P., Art. 354. *Hynson v. Texada*, 470.
31. Parol evidence is inadmissible to change the parties to a written instrument, by showing that the party who signed the note did so as the agent and surety for another, whose name does not appear on the note. *Bogan v. Calhoun*, 472.
32. The answers of a party interrogated on facts and articles form a part of the pleadings, and make a part of the record, and either party may use them without formally introducing them in evidence. *Burckett v. Hopson*, 489.
33. A party who introduces evidence not admissible under the pleadings, cannot object to testimony being offered by the opposite party to rebut it. *Monsseau v. Thebens et al.* 516.
34. Where the defendant alleges a written contract, he will not be allowed to prove by parol a verbal acknowledgment by plaintiff, nor will he be allowed to amend his answer by striking out the word "written," when the case is on trial, in order to enlarge the evidence. *Duplantier v. Michoud*, 530.

SEE AGENCY—*Humphrey v. Browne*, 158.

" BILLS AND PROMISSORY NOTES—*Wolfe v. Poirier*, 103.

" CONFED. TREASURY NOTES—*Norton v. Dawson*, 464.

## EXECUTION.

1. The execution of a judgment cannot be suspended on a rule to show cause. A suspensive appeal will not lie from a judgment dismissing such a rule. *Wiley v. Woodman & Bement*, 210.
2. Execution of judgment can only be suspended upon petition, affidavit and bond given for injunction. *Ibid.*

SEE PRACTICE—*Wiley v. Woodman & Bement*, 188.

## EXECUTORS AND ADMINISTRATORS.

1. A curator by refusing to take the oath of allegiance, and going beyond the jurisdiction of the proper authorities became *functus officio*, and lost all right to administer the property of the succession any further, and all claims to any commissions, except on sums recovered by him prior to the abandonment of his trust.  
*Succession of Poindexter, 22.*
2. The appeal will not be dismissed on the ground that the appeal bond was given in favor of the wife, the surviving partner in community, as tutrix to her minor children, and not in her own right. The tutrix is *ex officio* administratrix of the estate, and the judgment appealed from is the property of the estate; so is the appeal bond.  
*Bronson et al. v. Balch et al. 39.*
3. The administration of the succession involves with it the administration of the community, and the administrator may rightfully cause the community property to be sold to pay the debts of the succession.  
*Ibid.*
4. An administrator has not authority beyond the limits of the State that appointed him. He must be confirmed in his administration by the Courts of the State, in which property is situated, or debts are owing, before he can administer the property or sue therein for the debts.  
*Mason v. Nutt, 41.*
5. An administrator can pay the debts of the succession only upon the authorization of the Court; the balance in his hands, after paying the debts, must be paid over to the heirs, or their legal representatives, by order of the Court. If he pays without such authorization, he does so at his peril.  
*Succession of Robson, 97.*
6. Where the account filed by the executor makes a *prima facie* showing that he has no funds on hand to distribute, and the contrary is not made to appear, the Court will not order him to file a tableau of distribution.  
*Succession of Watterston, 104.*
7. Where a tutrix, administering, acknowledges in her account that the heirs are her creditors, and it is evident that she is indebted to them, the judgment homologating the account cannot be annulled; but it may be reduced by the creditors, if they show that the whole sum allowed is not due.  
*Fendler v. Daigre et al. 190.*
8. J. C. P. Wederstrandt owned a plantation in the parish of Plaquemines, La., which he left in charge of Pierre Cazenave, his agent and factor, and went to New York in 1863, where he died in the month of February, 1864. Previous to his death he made a will, wherein he appointed Pierre Cazenave (his agent) testamentary executor of his succession, who qualified as such on the 19th of March, 1864; prior to the time the executor qualified, a crop was planted and in a growing condition, under his direction as agent; the agent, on becoming the executor, continued the working of the crop through the season, with the full knowledge of the creditors and legatees: *He'd*—That whatever the executor has necessarily

EXECUTORS AND ADMINISTRATORS (*Continued.*)

paid out in carrying on the plantation should be allowed in the settlement of his accounts. The fact that he did not call a meeting of the creditors under Art. 1160, C. C., cannot throw upon him all the expenses incurred in good faith, and make him at the same time pay over the proceeds of the crop.

*Succession of Wederstrandt*, 494.

9. Where the executor of an estate has filed an account of his administration, and all the credits are admitted, and all the debits are denied, and the account appears to be fair and reasonable, the presumption is in favor of the executor, who is an officer of the Court, and positive and direct proof of every item is not required. *Ibid.*

SEE SUCCESSION—*Smith v. Westholtz*, 293.

“ “ *Ware v. Jones*, 428.

“ “ *Succession of Bachemin*, 488.

SEE TUTOR AND TUTORSHIP—*Succession of Peniston*, 277.

“ “ “ *Vincent v. D'Aubigné*, 528.

## EXECUTORY PROCESS.

1. An *ex parte* order of seizure and sale of mortgaged property, under a title importing a confession of judgment, must not contain any other or superior right over the property than that given by the mortgage. The law will not allow the mortgagor to incorporate a privilege on the property mortgaged, in the decree rendering the mortgage executory. The order must follow strictly the specifications in the act of mortgage. *Easterling v. Thompson*, 34.
2. In proceedings *via executiva* the creditor must bring himself within the letter of the law. *Ricks v. Bernstein*, 141.
3. Where a discrepancy exists between the note and the act of mortgage by which it is secured, the holder cannot proceed by executory process. *Ibid.*
4. Where a party, holding a mortgage importing a confession of judgment against the property of his debtor, resorts to the executory process to have the property seized and sold, he must bring himself within the strict requirements of the law. *Fortier v. Burthe et al.* 510.
5. Where the evidence shows that the party, in whose favor an order of seizure and sale has been rendered, is not entitled to the full amount for which it was granted, it will be set aside, and the injunction made perpetual. *Ibid.*
6. The law requiring property, sold at succession or probate sale, to bring its appraisalment, does not apply to a case where the succession property has been mortgaged, and the creditor has had the property sold under executory process; in such cases, the law regulating the sale of property under execution governs as to the amount of the bid. *Vincent v. D'Aubigné*, 528.

SEE BILLS AND PROM'Y. NOTES—*Burton v. Kron et al.* 107.

SEE PRESCRIPTION—*Perroux v. Lacoste*, 266.

SEE RES JUDICATA—*Humphrey et al. v. Brown et al.* 158.

## FRAUD.

SEE INSURANCE—*Pino v. Merchants' Mutual Ins. Co.*, 214.

## GARNISHMENT.

1. A simulated or fraudulent title cannot be attacked by the process of garnishment. *Kearney v. Nixon—May & Co. Garnishees*, 16.
2. A draft or note filed in a suit may, by garnishment process, and interrogatories served upon the clerk of the Court, in whose custody it is, be attached in a suit instituted in another Court; and if his answers disclose possession of the draft the service is good.  
*Mille et al. v. Hebert et al.*, 58.
3. The garnishee is not required to answer, categorically, every question asked in the interrogatories, it is sufficient, if his answers negative every fact enquired of in the interrogatories.  
*Taylor & Knapp v. McGee*, 374.

SEE PRACTICE—*McKinbrough v. Castle*, 128.

## HUSBAND AND WIFE.

1. The husband having signed the bond with his wife, his authorization is implied. *Wickliffe v. Dawson*, 48.
2. A married woman, properly authorized, may bind herself as surety for any other person than her husband. *Ibid.*
3. When the wife brings a suit on a promissory note in her favor, and alleges in the petition that her husband joins in the suit, with no allegation or evidence of a separation of property between them, and no stipulation against a community of acquets and gains, the Court will not presume the authorization of the husband, but, on the contrary, will presume a community between them.  
*Beigel v. Lange*, 112.
4. The note being given in favor of the wife, does not make it her separate property; it is still community property. *Ibid.*
- \* 5. In an action by the wife for a separation of property, where the creditor of the husband files his intervention on the day preceding the trial, and does not show due diligence, the intervention will not be sustained. *Strickland v. Strickland et al.*, 118.
6. The articles of the two Codes upon this subject do not authorize an intervention to be filed at any stage of the cause. They must be construed together, and applied according to the circumstances of each particular case. *Ibid.*
7. To make a judgment rendered against the husband and wife valid, the wife must be authorized by the husband or the Judge to appear and defend the suit. *Washington v. Hackett*, 146.
8. Plaintiff brings suit against a married woman, on a promissory note, alleged to be given for her own benefit, and joins her husband in the suit. A judgment by default having been set aside, the wife alone filed an answer. No steps were taken to have her authorized to appear in Court: Held—That her appearance being unauthorized, the judgment must be reversed. C. C. 123.  
*Champlin v. Lee et al.*, 148.

HUSBAND AND WIFE (*Continued.*)

9. A note signed by a married woman is invalid, where it is not shown that the debt inured to her separate benefit, nor that she was properly authorized. The presumption is that the debt is that of the community. *Thomson et al. v. Chick et al.* 206.
10. Where the wife, separated in property from her husband by a judgment of the Court, enjoins the seizure under a *feri facias* against her husband, on the ground that she is the owner of the property seized, she must establish her ownership with legal certainty, otherwise the injunction will be dissolved with damages. *Goldsmith, Haber & Co. v. Michel*, 272.

SEE COMMUNITY—*City In. Co. v. The Lizzie Simmons*, 249.

SEE PRACTICE—*Marrionneaux v. Downs*, 208.

## INSOLVENCY AND INSOLVENT PROCEEDINGS.

1. A syndie's commissions are limited to five per cent. on the net amount of money received by him. *Gaillard v. His Creditors*, 87.
2. The fact that a debtor is under protest, and does not pay his debts, does not establish his insolvency. It must be shown that he has not the means of paying his debts, by showing that all his property and credits are not equal in amount, at a fair valuation, to the debts due by him. *Lea v. Bringier*, 197.

SEE AGENCY—*Bank of Louisiana v. Wilson*, 1.

SEE BANKRUPTCY—*Meekins, Kelly & Co. v.*

*Their Creditors*, 497.

## INSURANCE.

1. Where a policy of insurance contains a condition that the insurance shall not be binding until the actual payment of the premium, the insurers, if they elect to do so, may waive the condition, it being one inserted solely for their benefit; and parol testimony is admissible to prove the waiver. *Pino v. Merchants' Mutual Ins. Co.* 214.
2. Where an application for insurance is made and accepted, and the policy is made out in duplicate, and the name of the assured, as such, put down on the books of the insurance company, the contract is complete; and, unless the company have required payment of the premium, or given notice that they will not be bound until the premium is paid, there is a waiver of such payment. *Ibid.*
3. Proof of such a waiver is no violation of the rule prohibiting parol evidence to vary or contradict a written contract. *Ibid.*
4. The rule is well settled, in relation to the contract of insurance, that all matters which show the transaction to be void, on the ground of fraud or otherwise, must be specially pleaded. Evidence of fraud is inadmissible under the general issue. *Ibid.*
5. An insurance company is liable on a fire insurance policy for damages done to goods by water used in saving them from destruction by fire. *Geisek v. Crescent Mutual Ins. Co.* 297.



INSURANCE (*Continued.*)

6. In the margin of the policy of insurance of the ship *Pettigrew*, the following clause appears: "Warranted by the assured free from all claim for loss or damage, arising from or growing out of the collision of foreign powers, or of our government with others." At the time this policy was affected, the city of New Orleans, the domicile of the insurance company, was in possession of the insurgents, engaged in armed rebellion against the United States. Just prior to the capture of the city by the Federal fleet, the insurgent military commander ordered the burning of all the cotton in and about the city. Under these orders, the ship *Pettigrew* was destroyed by fire: *Heid*—That the destruction by fire of the ship *Pettigrew*, resulted from and grew out of the "collision" between the United States and the insurgents, then in arms against its authority; and the loss or damage growing out of that collision was not a peril insured against.

*Marey et al. v. Merchants' Mutual Insurance Co.* 388.

7. Where the Merchants' Mutual Insurance Company of New Orleans, having insured the steamship *Cornudella* to navigate the waters of the gulf between certain ports named in the policy, seek to avoid payment of the insurance, when the vessel has been lost by being wrecked on the bar, while attempting to enter one of the ports named; they must show by evidence that the loss occurred through the negligence and fault of the master of the vessel.

*Domingo v. Merchants' Mutual Ins. Co.* 479.

8. It is sufficient for the master to place the vessel in charge of a pilot familiar with the bar and channel, who has been in the habit of piloting sea-going vessels across the bar, where the contract shows no stipulation to the contrary.

*Ibid.*

9. Where an insurance company has affected an insurance on merchandise, with the words in the policy, *laden* or *to be laden* on board, and the bill of lading for a part of the goods bears date anterior to the date of the policy, and the defendant pleads the general issue, it must be held to include all the goods embraced in the contract of insurance, *laden* and *to be laden*. The insurer must make a special defence to put the insured to the proof, that all the goods were actually at risk.

*Hinck v. Home Ins. Co.* 527.

## INTEREST.

1. Default is unnecessary to enable the holder of an accepted draft to recover interest thereon from the time it becomes due.
- Collins v. Sabatier*, 299.
2. Where a party accepts negotiable paper, payable at no particular place, he puts it out of his power to make tender of payment, and thereby deprives himself of the right to stop interest. *Ibid.*
3. A promissory note, payable on time with interest, bears interest from date.
- Bogan v. Calhoun*, 472.

## INTERVENTION.

SEE PRACTICE—*Clapp & Co. v. Phelps & Co.* 461.

## JUDGMENT.

1. When no judgment by default has been taken prior to rendering a final judgment, it is a nullity, and will be so declared when attacked by a third party.  
*Washington v. Hackett*, 146.
2. Plaintiff, in his petition, alleges an indebtedness by defendant in her own right, and as tutrix to her minor children, but prays judgment against her, and has citation served on her only in her own right. A judgment against her as tutrix will not be sustained.  
*Walker v. Acklen*, 186.
3. The judgment of the Court must conform to the verdict of the jury.  
*Ibid.*
4. A final judgment, rendered without a judgment by default being first taken, is a nullity, and will be so declared on appeal.  
*Riggin & Co. v. Merchants' Bank*, 373.
5. A judgment based on a written agreement of the parties, must conform to the terms of the agreement.  
*Sprawl et al. v. Stewart et al.* 433.
6. Where the parties to a suit have consented in writing to a judgment, and the judgment of the Court does not conform to the consent, either party has the right to appeal to have the error corrected.  
*Ibid.*
7. A judgment rendered without citation or appearance, and without anything equivalent to citation or appearance, is utterly void, and imports such absolute nullity, that any one having the least interest in opposing its effects may have such nullity pronounced.  
*Madden v. Fielding*, 505.
8. Where a Judge is to use his legal discretion upon a certain state of facts, he can only execute that discretion after those facts are judicially made known to him; that is, by legal proof.  
*Ibid.*
9. The reasons for the judgment rendered by the District Court were: "When after hearing the evidence and argument of counsel, and considering the law, evidence and argument, it is ordered," etc: *Held*—That this is as much a reason for judgment in favor of defendant as of plaintiff, and does not meet the requirements of the Constitution. Art. 76, Tit. 5, Con. 1864.  
*Emanuel v. Hatcher*, 525.
10. The Supreme Court has the power to render in the premises such a judgment as the Court below should have rendered; and where the evidence is before the appellate Court to enable it to do so, a final judgment will be pronounced, after declaring the judgment of the lower Court null and void.  
*Ibid.*

SEE APPEAL—*Lynn v. Lowenthal*, 527.

SEE CONSTRUCTION, RULES OF—*McKinbrough v. Castle*, 128.

## JUDICIAL SALES.

1. The title of one who purchases property, sold under execution issued on a judgment, from which a devolutive appeal had been taken, will not be affected by a reversal of the judgment.  
*Frost v. McLeod*, 69.
2. The fact that plaintiff bought succession property at sheriff's sale, while it was advertised by the sheriff for sale in another cause, does not of itself render the sale null. *Bossier v. Kennedy et al.* 107.
3. The military order staying proceedings against the property advertised for sale on the 21st January, 1866, when notified to the sheriff, put an end to that sale. It was an injunction issued by paramount authority, and the subsequent revocation of the order did not authorize the sale to be made without a new advertisement.  
*Humphrey et al. v. Browne et al.* 158.
4. The fact that a person, whose property was being sold at judicial sale, was present at the sale and did not object thereto, is not a waiver of legal formalities. *Ibid.*
5. The assertion of title by a third party to property about to be sold at judicial sale gives him a standing in Court, by third opposition, to claim the proceeds of the sale in preference to others, and by that means to ratify the sale. *Bach v. Verbois et al.* 163.
6. Where real property was advertised by the sheriff, and on the day fixed he postpones the sale, without offering the property, he must advertise the same anew for thirty days, or the sale will be declared null.  
*Montgomery et al. v. Barrow et al.* 169.
7. Discretion in the execution of legal solemnities cannot be supported. *Ibid.*
8. A purchaser at probate sale is not required to look beyond the decree recognizing its necessity. *Wright v. Cummings et al.* 353.
9. Article 990 of the Code of Practice, does not imperatively require the preliminary offering of succession property for sale for cash; it may be offered at first sale on credit, when it appears to be to the interest of all parties concerned, and none except those having an interest in the sale of the property can complain. *Ibid.*
10. The recording of a proces-verbal of sale in the parish where the property lies, is notice to third parties. The omission to record it in the parish where the succession is opened, will not operate a nullity of the sale. *Ibid.*

## JURIES AND JURORS.

1. It is the province of a jury to find the facts of a case; but the finding must be upon evidence. *McWilliams v. Plaquemine*, 74.
2. Where a reconventional demand grows out of the plaintiff's cause of action, a verdict for one party is necessarily a verdict against the other. *Delee v. Hatcher*, 98.

JURIES AND JURORS (*Continued.*)

3. The law prescribing the mode of drawing juries, directs that the list of jurors drawn for each term shall be filed in the clerk's office as soon as completed, subject to the inspection of any person who may desire to examine it, in order that any objections which might or could be made, on account of any defects or informalities which may have occurred in the formation, drawing or summoning of jurors, or any other defect whatsoever in the construction of the jury, shall be made on the first day of the term. *State v. Vegas*, 105.
4. If the *venire* is not filed on or before the first day of the term, and the petit jury find a verdict of guilty, a new trial will be granted. *Ibid.*
5. The verdict of the jury must be supported by the testimony in the record. *Crawford v. Chapman*, 124.
6. After the jury have received the charge of the Judge, in a capital case, and have retired, the Judge is not authorized to give separate and private instructions to any of the jurors. *State v. Frisby*, 143.
7. If they desire further instruction, he should order all to be brought into Court, and there instruct them in presence of the counsel. *Ibid.*
8. The act of the Legislature, approved March, 1858, relative to the drawing of grand jurors, requires the foreman to be selected from the whole *venire*, and the remainder to be placed on slips of paper in a box, from which the sheriff draws fifteen names, which, with the foreman already selected, forms the grand jury—a grand jury drawn from the list of names on file is irregular. Where the offence charged in the indictment was committed on the first day of the term, it is impossible for the accused to file his objections to the mode of drawing the jury on the first day of the term; in such cases the objections may be made afterwards. *State v. Texada*, 436.

## JURISDICTION.

1. The Second District Court of New Orleans is without jurisdiction in a suit where an estate is plaintiff. The Court is limited to probate jurisdiction alone. Acts 1865, p. 84, § 8. *Barrett v. Halpin*, 160.
2. Whilst contracts relating to the condition of slavery had the sanction of law, they could be judicially enforced; but the abrogation of the law, giving effect to those contracts, leaves the Courts without authority to enforce them. *Wainwright v. Bridges et al.* 234.
3. The jurisdiction of the Second District Court of New Orleans is restricted to probate proceedings. It has exclusive cognizance of suits against a succession, but has no jurisdiction where a succession is plaintiff. *Succession of Thayer*, 257.

JURISDICTION (*Continued.*)

4. Courts of justice, which act only upon and under the law, cannot give vitality to laws which have become, by paramount authority, inoperative and void. *Austin v. Sandel*, 309.
5. The doctrine in the case of *Wainwright v. Bridges*, reaffirmed. *Ibid.*
6. The Supreme Court of Louisiana will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it to be suggested without any plea, and at any stage of the proceedings. *Bowman v. Gonegal*, 328.
7. Where the consideration of the sale was a slave, who afterwards became free by the act of the sovereign power, the Courts are without authority to enforce payment of the price. They are alike without authority to give judgment for the hire of the person (slave) before emancipation. *Tate v. Fletcher et al.* 371.
8. The doctrine in the case of *Wainwright v. Bridges* reaffirmed. *Ibid.*
9. The doctrine in the case of *Wainwright v. Bridges* reaffirmed. *Courtney v. Shelton*, 380.
10. A written obligation for the payment of money for services rendered or to be rendered in the so-called Confederate army as a substitute, is illegal on its face, absolutely null and void, and cannot be judicially enforced. *Stewart v. Bosley et al.* 439.
11. A contract to serve in the Confederate army as a substitute for another was unlawful, and carried with it no legal obligation. This Court will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it without any plea at any stage of the proceedings. *Wright v. Stacey*, 449.
12. Parties cannot be heard, who ask relief from a violation of law. The Court leaves them where their conduct has placed them, and *in pari culpa melior est conditio possidentis*. *Ibid.*
13. Courts of justice will not lend assistance to enforce or annul contracts, when the consideration is illegal and reprobated by law. *Windham v. Cerf*, 498.
14. The jurisdiction of the Second District Court of New Orleans, over the persons and property of minors whose parents had died within its limits, and to whom it had appointed a tutor, who has since died, is not divested by the removal of the minors to another State. *Succession of Stephens*, 499.
15. Where minors have removed to another State, after the death of their tutor in this State, and guardians have been appointed thereto by competent judicial authority, such appointments will not be recognized by the Probate Court of this State having jurisdiction of the minor's property. They must qualify as tutors to the mi-



JURISDICTION (*Continued.*)

nors, according to the laws of this State, before they can sue for or obtain possession of the property of the minors. *Ibid.*

16. The doctrine in the case of *Wainwright v. Bridges* reaffirmed.

*Halley v. Hoeffner*, 518.

SEE ADMIRALTY—*Berwin v. Matanzas*, 384.

SEE CONFEDERATE TREASURY NOTES—*Huck v. Haller*, 257.

“ “ “ “ *McCracken v. Poole*, 359.

“ “ “ “ *Howard v. Kirwin*, 452.

SEE EMANCIPATION—*Whitehead et al. v. Watson et al.* 68.

SEE SOVEREIGN POWER—*Gremillon v. Crousillac*, 377.

## LANDLORD AND TENANT.

1. The placing by a tenant of a partition across the hall of a building rented, so as to be readily removed without injury to the building, is a change that the lessee may make, as being of the nature of contract of lease. *Kunemann v. Boisse*, 26.

2. The lessor has the right to restrict the use and enjoyment of his property in the hands of the lessee. *Ibid.*

3. When the lessor subjects alterations in the article of lease to his written consent, he is presumed to have had in view those changes which the lessee may make without the consent of the owner.

*Ibid.*

4. To the contract of lease three things are absolutely necessary: the thing, the price, and the consent. The price should be certain and determinate. C. C. 2640 and 2641. *Jordon v. Mead et al.* 101.

5. The mere occupancy of property does not necessarily imply the relation of lessor and lessee. *Ibid.*

6. A lessor has a privilege on the growing crop of the year, to secure the payment of the rent; and the lessee cannot defeat the lien, without showing that he has been damaged by the interference of the lessor during the year. When it is agreed between the lessor and lessee that the lien shall be reduced to writing, and it is not done, the lessee must show, by evidence, that he has been damaged by the refusal, before he can claim the damages.

*Knox v. Booth*, 109.

7. The plaintiffs, as lessors, have the first privilege on movables seized and sold on a plantation, except on the crops; on which the laborers and overseer have a preference.

*Duplantier et al. v. Wilkins et al.* 112.

8. The proceeds of the crop being exhausted, the sheriff has no right to pay the overseer out of proceeds of movables, to the prejudice of the lessor. *Ibid.*

LANDLORD AND TENANT (*Continued.*)

9. The goods of a debtor being seized by his judgment creditor, upon premises leased by their owner to another party, and the landlord having intervened by third opposition, and had the goods provisionally seized for rent and the proceeds of sale being adjudged to him, the original judgment creditor has his remedy against the principal lessee for the amount of his judgment to the extent that the proceeds of the sale were applied to the extinguishment of the landlord's claim.  
*Simon v. Leopold*, 154.
10. The defendant, having confessed judgment on the landlord's opposition, cannot afterwards maintain that he was not the real lessee.  
*Ibid.*

## LAWS.

1. Slavery seems never to have been established on the continent of America by positive law. Its origin appears rather to have been accidental. In the United States it was simply permitted by the constitution, to continue as it had existed in the colonial state of the country, and clearly without extending to it, even an indirect sanction. The framers of that instrument abolished the African slave-trade after the year 1808, and, looking forward to general emancipation at an early day, left the institution of slavery as they found it.  
*Wainwright v. Bridges et al.* 234.
2. The province of Louisiana, when transferred to the United States, retained African slavery by the conditions of the transfer, to the extent only that it was tolerated by the Constitution of the United States, and, consequently, it was imbued with that caducity and proneness to extinction, which, from the genius and spirit of this government, has characterized the condition of slavery in this country ever since the American revolution.  
*Ibid.*
3. Where the defence is, that by the law of the State where the contract is made, the surety is not liable, provided he has given notice to the holder, until he has prosecuted the principal to insolvency, the statute must be filed in evidence; otherwise, the Court will presume that the law is similar to our own, and the case will be determined according to the laws of Louisiana.  
*Nalle v. Ventress*, 373.
4. The law of the place where the contract is made fixing the rate of interest will govern, provided the statute is filed in evidence.  
*Ibid.*

SEE PRESCRIPTION—*White v. McKee*, 111.

## MANDAMUS.

1. Where the District Judge renders judgment, on a rule to show cause why execution should not issue, dismissing the rule, a *mandamus* will not lie to compel him to order an execution. The decision, on the rule, is a judgment of the Court, which can only be inquired into on appeal.  
*State ex rel. Logan & MacKinson v.*  
*Judge of the Fourth District Court*, 4.

## MINORS.

1. The legal or tacit mortgage, existing in favor of minors against their tutor, cannot be erased or canceled, without substituting a special mortgage in the stead thereof, in the manner prescribed by the act of the Legislature of 11th of March, 1830, re-enacted in 1855. *Fleetwood v. Bordis et al.* 55.
2. The law has created the tacit mortgage in favor of minors; and its provisions, to cancel it by substituting a special one, must be strictly observed. *Ibid.*
3. The nullity declared by Article 355 of the Civil Code, is relative, and cannot be urged by the minor, after he becomes of age, who is seeking the benefit of the alleged agreement, by which a partial payment or advance was made to him. *Frost v. McLeod*, 80.
4. Where minor heirs have a general mortgage upon the property of their tutor, they cannot have recourse upon his property specially mortgaged, if the tutor has other property subject to the general mortgage sufficient to discharge it. *Laplace v. Haydel*, 363.
5. An unliquidated mortgage of a minor does not prevent a sale of the property of the tutor specially mortgaged by the owner's judgment creditor. *Ibid.*
6. If the legal mortgage of the minor heirs, has superiority of rank and priority of date to the special mortgage, the property seized will pass to the purchaser subject to the legal mortgage, and their right to pursue it by the hypothecary action will remain unimpaired. *Ibid.*

SEE JURISDICTION—*Succession of Stephens*, 499.

SEE TUTOR AND TUTORSHIP—*Perret v. Roussel*, 174.

## MORTGAGES.

1. A mortgage debtor may legally renounce the benefit of appraisement in the proceedings to sell on executory process, and will not be afterwards allowed to attack the sale as invalid. *New Orleans Mutual Ins. Co. v. Bagley*, 89.
2. The statute of March, 1866, requiring that all property sold under execution should bring its full appraisement, does not deprive the debtor of the right to make a waiver of the benefit of appraisement. *Ibid.*
3. The purchaser of mortgaged property who assumes the payment of the mortgaged debt becomes personally liable therefor. *Schlatre et al. v. Greaud*, 125.
4. The Court will not declare a mortgage null for want of reinscription within ten years. The parties in interest have their remedy by causing the mortgage to be canceled. *Robinson et al. v. Haynes et al.* 132.

MORTGAGES (*Continued.*)

5. A part of the heirs of an estate sold to the other heirs their interest in the property of the succession, consisting of land, slaves and movables. The vendees specially mortgaged "said land, slaves and movables," to secure notes given in part payment, and in said mortgage described the whole property of the succession: *Held*—That the mortgage attached to the whole property, and not alone to the interests conveyed by the vendors.  
*Potts v. Blanchard et al.* 167.
6. An obligor on a special mortgage, given as additional security to a note already secured by a mortgage given by another party and on other property, cannot be treated as a third possessor. Such an obligor cannot avail himself of the plea of discussion.  
*Ricard v. Harrison*, 181.
7. Where one of a series of notes, secured by mortgage, delivered by the maker, has come again into his hands, the debt evidenced by it is extinguished by confusion. C. C. 2214.  
*Schinkel v. Hanewinkel*, 260.
8. By reissuing such note, after maturity, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing it, which being only an accessory to the principal debt between the maker and the payee, is extinguished with the note. C. C. 3252, 3374. *Ibid.*
9. Where a party sells a tract of land on time, and takes the notes of the vendee, secured by mortgage on the land to secure the payment of the price, and the vendee, before the price is paid, sells the same land to another party, who assumes the mortgage in favor of the original vendor, the first vendor may have the land seized and sold to pay his mortgage, and the second vendee cannot set up, by way of exception, that the suit be dismissed as to him.  
*Boyce et al. v. Hunt et al.* 449.
10. The original vendee of the land may be sued on the notes, and the mortgage enforced on the land of his vendee in the same suit. *Ibid.*
11. A contract of mortgage that is valid by the law of the place where it is made, is valid everywhere. *Dobbin & Co. v. Hewett*, 518.
12. A mortgage executed in the State of Maine, in accordance with the laws, on a brig or vessel, must be enforced in this State in accordance with the laws of the State of Maine. By the law of the State of Maine, brigs and other vessels are personal property, and may be mortgaged, and the non-performance of the obligation for which the mortgage was given, operates an absolute transfer of the property mortgaged to the mortgagee. *Ibid.*
13. Where a brig or other vessel has been mortgaged in the State of Maine, and afterwards arrives at the port of New Orleans, where she is attached by an ordinary creditor, and the mortgagee intervenes, and claims the ownership of the vessel by virtue of his mortgage, the attachment will be set aside, and the suit dismissed, and the mortgagee will be declared the owner. *Ibid.*

SEE MINORS—*Fleetwood v. Bordis*, 55.

## NEW ORLEANS.

1. The Common Council of the city of New Orleans passed a resolution in the year 1856, whereby the city bound itself to pay to any person who should discover and make report, and give due information of the location, and description of any real estate in the city belonging to it, of which there was no record on the books of the city, and to which it shall appear that the city has a valid title, a commission of five per cent. on the value of the same. In pursuance of this resolution, Louis H. Pilie, then holding the office of city surveyor, made examination, and discovered certain real estate previously unknown to the city, of which it took possession, and sold for the benefit of the corporation: *Held*—That in the absence of proof showing that the discoveries and report formed a part of his official duties, as city surveyor, he is entitled to recover the per centage allowed by the resolution. *Pilie v. New Orleans*, 274.

SEE TAXES AND TAX SALES—*James v. New Orleans*, 109.

## NEW TRIAL.

1. A motion for a new trial is in time, if made before the judgment has been presented to the Judge for his signature, although more than three days may have elapsed after judgment was rendered.  
*Citizens' Bank of Louisiana v. Bellocq, Noblom & Co.* 376.
2. If a party withdraws his application for a new trial, and does not embody his withdrawal in a bill of exceptions, he thereby waives his right to a hearing thereon in the Supreme Court. *Ibid.*
3. A new trial will not be granted on the ground of newly discovered evidence, when the alleged newly discovered evidence, if offered, would be inadmissible under the pleadings.  
*Devot & Co. v. Marx*, 491.
4. Where the Court below has exercised a sound, legal discretion in overruling a motion for a new trial, the Supreme Court will not interfere. *Ibid.*

## NOTARY PUBLIC.

1. A notary public in the city of New Orleans is authorized to appoint one or more deputies to assist in making protests and serving notices, and whatever facts come necessarily within the knowledge of the deputy, while thus assisting the notary, may be certified to, and are as much evidence as though within the personal knowledge of the notary.  
*Kock v. Bringier*, 183.

## OBLIGATIONS.

1. Where an obligor, from inevitable accident or irresistible force, cannot perform one of two things, either of which at the time of his engagement he had the option to do, he is not relieved from the obligation to perform the other. *Jacquinet v. Boutron*, 30.
2. Where there is no principal obligation, there cannot be an accessory one.  
*State v. Doax, Thompson and Gay*, 77.



OBLIGATIONS (*Continued.*)

3. Notice of the transfer of an instrument, not negotiable, cannot defeat any equity or offset in the hands of a debtor, at the time of receiving the notice. *Kugler v. Taylor*, 100.
4. The plaintiff, being a third party, holding a receipt not negotiable, possesses no greater rights than the party to whom the receipt was given. *Ibid.*
5. To bind parties against their will, for a specific sum under provisions of law enacted in the public interest, all the formalities of such law must be rigidly observed; such parties may be liable on a *quantum meruit*, if it be shown that the work is necessary and useful to them. *O'Connor v. Stewart*, 127.
6. The proprietor of a tract of land has a right to excavate within his own boundaries a canal, for the purposes of navigation, and to require payment for its use from those who choose to avail themselves of its facilities. *Harvey v. Potter*, 264.
7. If works, beneficial to the public, are constructed by private enterprise upon private property, and the public choose to avail themselves of the benefits of such works, equity would require compensation to be made for the benefits conferred. Persons availing themselves of such privileges form an implied contract to remunerate the owners of the property, and it is immaterial under what term or expression such remuneration is claimed. *Ibid.*
8. Plaintiff received a letter informing him that a draft drawn by the steamboat *Magnolia* for \$1,200, was placed in the City Bank of New Orleans for collection; being the agent of the boat, he immediately went and paid the draft, and took it up on the same day the holder called, and the clerk of the bank paid him the money, charging no commissions and making no entries of the transaction in the books of the bank. Plaintiff afterwards learned that the letter and the draft were both forgeries: *Held*—That the action of the plaintiff relieved the bank from any liability which may have attached for receiving what is not due. *Stephenson v. Mount et al.* 295.
9. Plaintiff was employed in 1860 as superintendent of the Metairie Race Course, at a fixed salary; in May, 1862, most of the officers of the association left the city, leaving plaintiff in charge of the grounds: *Held*—That he is entitled to his salary until the grounds were taken under full and absolute control by the military forces, in November, 1864. *Vowell v. Metairie Association*, 298.
10. Where a party sells a tract of land to another, with a stipulation in the act of sale, that the vendee is to have a right of way, and other servitudes belonging to the land, he cannot enforce the payment of the price until he has complied with that obligation. *Fortier v. Burthe et al.* 510.

## OFFICE AND OFFICERS.

1. The doctrine that the power to remove is incidental to the power to appoint, does not apply to governors of States. Their power of removal is limited to particular cases, provided for by statutory enactments. *Dubuc v. Voss*, 210.
2. Where two commissions have been issued by the governor, at different times, to different parties, for the same office, and the one bearing the latter date states on its face that the officer holding the first commission is removed, the presumption is, that he was removed for causes provided for by statute, and the latter commission will supersede the former. The presumption in favor of the proper exercise of power by the governor is subject to be overthrown by countervailing evidence. *Ibid.*

## PARTNERSHIP.

1. A retiring partner of a commercial firm is not exonerated from responsibility for subsequent engagements made in the name of the partnership with persons previously in the habit of dealing with it, unless special notice of the withdrawal be given them. *Denman & Co. v. Dosson, Todd and McRae*, 9.
2. In a suit for the settlement of a general commercial partnership between the partners, a mandate of sequestration is the only conservatory remedy to which the plaintiff can resort. The property is owned jointly, and is undivided, and as the plaintiff is entitled to an equal share with the other partners, of every portion of it, the whole of it must be sequestered. *Blanchard v. Luce*, 46.
3. Defendant being proven to have been a partner in the transactions forming the basis of the suit, and the goods having inured to the benefit of that partnership, he is liable, notwithstanding that the credit had been given to the other party, individually, who had made settlement by giving his separate note for the balance due. *Roth & Deblieux v. Moore*, 86.
4. Where the creditors of a commercial partnership make settlement with the liquidating partner after the dissolution, and take his separate notes in full settlement of their claim, and it appears that they were at the time aware that the liquidating partner had assumed all the liabilities of the partnership, the retiring partner will not afterwards be held responsible. *Hoopes & Townsend v. McCan*, 201.
5. A mortgage was executed by Mrs. E. J. Penny in 1857, for \$8,000 on real estate, in favor of Lobit & Charpentier, commission merchants, for the purpose of securing and covering advances made, and to be made by said commercial house, for the benefit of the plantation of Mrs. E. J. Penny; after the execution of the mortgage, the commercial house of Lobit & Charpentier was changed by the addition of new parties, and styled Lobit, Charpentier & Co.;

PARTNERSHIP (*Continued.*)

in the year 1862, Mrs. E. J. Penny executed three promissory notes in favor of the new firm of Lobit, Charpentier & Co.; the holder of the notes brings suit to recover the amount, and claims the benefit of the mortgage in favor of the old firm, executed in 1857: *Held*—That the addition of another party in the firm dissolved the old firm, in whose favor the mortgage was executed, and created a new firm, in whose favor the notes were given, and the new firm could not avail themselves of the mortgage given in favor of the old firm. *Abat & Generes et al. v. Penny et al.* 289.

6. Plaintiff sues defendant for a settlement of the partnership account, and for damages against the managing partner. A third party intervenes, and claims a schooner as his own property, which he had purchased from the defendant, the managing partner, by notarial act, prior to the institution of the suit. Plaintiff resists his demand on the grounds, 1st: that the act of sale was not recorded, as required by acts of Congress; 2d, that it is not expressed on the face of the act of sale that he acted for himself and partners; 3d, that the price was not a good one, and the purchaser had notice of the claims of the other partners. The notarial act of sale, which informed the intervenor of the interest of plaintiffs, also informed him that the legal title was in defendant, and that the defendants have full authority to sell the vessel: *Held*—That, under the terms of this agreement and authority, the transfer of the schooner, by defendant to intervenor, of the legal title, carried with it the equitable title also. *Belloq, v. Dhones et al.* 503.

7. A commercial partnership is not liable on the obligations contracted by one of the partners previous to the formation of the partnership, notwithstanding the fact that the partnership was to continue the same business in which the obligations were contracted, and that specified portions thereof were assumed by the individual members. *Mousseau v. Thebens et al.* 516.

SEE COMMUNITY—*Carpenter v. Featherston & Amis*, 508.

## PLEDGE OR PAWN.

1. Delivery is of the essence of the contract of pledge or pawn, as a collateral or security. *Foltier v. Schroder & Schreiber*, 17.
2. In all cases of pledge, the pledgee must be put in possession of the thing pledged, and, if it be a claim, the evidence of the obligation must be transferred and delivered. *Lallande v. Ingram et al.* 364.
3. Shares of stock cannot be pledged, unless they be evidenced by certificates, which must be transferred and delivered to the pledgee. *Ibid.*
4. A transfer or sale of stocks cannot be inferred, when the relation of debtor and creditor exist on the face of the act of pledge. *Ibid.*

## POLICE JURIES.

1. The police jury of the parish of St. Tammany are prohibited by the charter, from imposing taxes on the town of Mandeville, in said parish.  
*Marigny v. Carradine*, 99.
2. A warrant drawn and signed by the president and clerk of the police jury, is not binding on the parish, unless the police jury have authorized them to sign the warrant.

*Capmartin v. Police Jury*, 448.

## PRACTICE.

1. Points not raised in the lower Court, will not be noticed in the Supreme Court, unless a formal written assignment of errors has been made.  
*Blanchard v. Luce*, 46.
2. Plaintiffs being mere ordinary creditors of the succession, their action is a personal one against each one of the heirs, to recover from him his virile share of his ancestor's debt, and plaintiffs have no legal right to stay, by injunction, the defendant's order of seizure and sale. Even privilege or mortgage creditors cannot arrest execution, but must resort to the remedy by third opposition, to stay the proceeds of sale in the sheriff's hands until the conflicting rights of preference to the fund can be determined.  
*White, Adm'r, v. Blanchard*, 59.
3. Where an order of seizure and sale has been obtained on a mortgage, and the debtor who granted the mortgage is absent from, and not represented in the State, the law does not require antecedent proof or affidavit of his absence, before an attorney can be appointed to represent him.  
*Frost v. McLeod*, 80.
4. A jury trial is not allowed on an opposition to the proces-verbal of the deliberations of the creditors of an insolvent succession ; such proceedings must be tried summarily.  
*Guion v. The Creditors of the Succession of Guion*, 81.
5. A suit having been dismissed, cannot be reinstated on the docket by an order granted *ex parte*.  
*Lacroix v. Bangs*, 88.
6. Where large fees are charged by the sheriff and clerk, and the sheriff fails to annex to his return specific bills for their fees, the case will be remanded to adjust the fees of those officers.  
*Duplantier et al. v. Wilkins et al.* 112.
7. Where the appellant allows three judicial days to elapse after the day fixed by the District Court for the filing of the transcript in the Supreme Court without obtaining an order extending the time, the appellee has the right to obtain the certificate of the clerk of the Supreme Court that the appeal has not been filed. If the appeal is afterwards filed in the Supreme Court, it will be dismissed on rule to show cause.  
*Police Jury v. Garrett*, 122.
8. Where a case has been dropped from the docket, and afterwards restored to the docket, and put at issue by the defendant filing an answer, the garnishee is not entitled to notice of the restoration of the cause.  
*McKinbrough v. Castle et al.* 128.

PRACTICE (*Continued.*)

9. No evidence is necessary to authorize the taking of interrogatories for confessed against a garnishee, other than his failure to answer.  
C. P. 263. *Ibid.*
10. A suit is brought against the sureties on a tutor's bond, and defendants obtain an order of Court suspending all further proceedings in the cause, until the rights of plaintiffs and other parties contesting them, under certain seizures of the tutor's property, made since the institution of the suit, shall be determined: *Held*—That an irreparable injury may result from such interlocutory decree, and the plaintiffs are entitled to an appeal therefrom.  
*Miler et al. v. Dupuy et al.* 166.
11. Where an exception has been tried and overruled by the District Judge, the same questions involved in the exception cannot be pleaded in the form of a motion to suspend further proceedings in the cause; this would be to renew and re-examine the exception which had been overruled. The decision on the exception may be reviewed with the merits on appeal. *Ibid.*
12. Issues of fact, not raised in the District Court, will not be passed upon in the Supreme Court.  
*Montgomery et al. v. Earrow et al.* 169.
13. No such proceeding as a plea in abatement, or bar to the action, is known to or recognized by our law. The execution of a judgment can be stayed only by injunction and bond.  
*Wiley v. Woodman & Bement*, 188.
14. Where the proceedings are *in rem* founded on a privilege, the defendant cannot except to the jurisdiction of the Court, on the ground of his domicile being in a different parish from that where the seizure is made.  
*Giffen, Smedes & Co. v. Manning*, 204.
15. A privilege follows the object to which it is attached, and the creditor may have the object seized by a writ of sequestration, in whatever part of the State it may be found, whether at the owner's domicile or not. *Ibid.*
16. Where plaintiff claims a privilege on cotton, or other property, and has it sequestered in a different parish from that of the domicile of the defendant, the personal action will be dismissed and the action *in rem* maintained. *Ibid.*
17. Payment is a peremptory exception, which may be pleaded at any time before judgment. *Reiners v. St. Ceran*, 207.
18. Want of amicable demand, to be available, must be pleaded before issue is joined. *Marrionneaux v. Downs et al.* 208.
19. Where husband and wife are defendants, citation served on the husband, in order to be binding upon the wife, must be addressed to her as well as to the husband. *Ibid.*
20. The rule of Court, declaring that no private agreement of the parties relative to the progress of any cause shall be alleged unless the evidence thereof shall be in writing, does not apply to agreements which may give rise to another suit. *Johnston v. Yale & Co.* 212.



PRACTICE (*Continued.*)

21. The waiver of a legal right, to be available, must be clearly and explicitly shown. *Ibid.*
22. Where an intervenor by third opposition asserts in his petition that the sheriff has seized property under a writ of *feri facias*, in the suit in which he intervenes, it is a judicial admission of the judgment and execution. *Asher v. Fredenstein*, 256.
23. Where plaintiff alleges that he drew a draft on defendants for the value of goods sold them, which they accepted, and the draft is annexed to and made a part of the petition, but is not offered in evidence on the trial, nor does the evidence in the record show a sale and delivery of the goods, the suit will be dismissed as of nonsuit. *Bridgeford & Co. v. Collon & Baldwin et al.* 261.
24. The matter of continuances for the most part addresses itself to the sound, legal discretion of the District Court, to be judged of according to the circumstances presented. *Rist v. Abbott*, 268.
25. Where a motion in the nature of a demurrer is made, the allegations of the petition are considered as true for the purposes of the motion; but if the cause is put at issue, it then devolves upon the plaintiff to establish his case by proof. *Boutte et al. v. Maillard et al.* 276.
26. In a revocatory action, where no allegation of insolvency is made in the petition, evidence cannot be introduced to prove the fact. *Abat & Generes et al. v. Penny et al.* 289.
27. Without the allegation and proof of insolvency the revocatory action cannot be maintained. *Ibid.*
28. The Court will not give judgment for the return of the price paid for goods, on account of the non-delivery by defendant, until plaintiff seeks to annul the contract for non-compliance by the defendant with its provisions. *Hart v. Adler*, 301.
29. An action for a partition, where there exists a joint ownership of property may be maintained, whether the plaintiff is in possession or not. *Denton v. Woods*, 356.
30. A Judge of a Court, having formerly been counsel of record in a case brought before him for trial, while sitting as Judge on the bench, is incompetent to try the case: his duty is to refer the case to a competent Judge for trial. C. P. 337 and 338. *Amacker v. Varnado*, 381.
31. An intervenor cannot, without the consent of the plaintiff, substitute himself in the place and stead of the defendant. C. P. 389, 390. *Capp & Co. v. Phelps & Co.* 461.
32. An intervenor stands in the character of plaintiff before the Court, as to the nature of the title, and the object of his demand, and is governed in his pleadings by the rules of practice which apply to plaintiffs in principal demands. C. P. 172. *Ibid.*

PRACTICE (*Continued.*)

33. Where the defendant, in his answer, filed in the cause, neither denies the legal right of the plaintiff to recover nor the truth of the allegations of the petition, they are taken by the Court to be confessed, and the plaintiff is dispensed from the necessity of adducing proof in support of his demand. *Ibid.*
34. An intervenor cannot be permitted to bond property in the custody of the sheriff under a sequestration: The right to bond is only given by law to the parties to the action; first, to the defendant; and if he neglects to exercise the privilege in ten days after the seizure, then to the plaintiff. *Ibid.*
35. The order to bond property under sequestration must be rendered by the Judge. Clerks of Courts have no authority to render such orders. *Ibid.*
36. The act of the Legislature, approved February 28th, 1866, prescribing the mode by which the records of the parish of Rapides, destroyed by fire in the year 1864, may be reinstated, does not permit the question of the invalidity of a judgment, the record of which has been destroyed, to be inquired into, in the suit for its restoration. Only the question of fact, as to the existence of such judgment and its destruction, can be made the subject of examination in such suits. Session Acts 1866, page 79.  
*McFeeley v. Osborn et al.* 471.
37. Where A sues for the use of B, and the Court is of opinion, from the facts of the case, that B had no interest in the suit before the action was brought: *Held*—That A was the real plaintiff, who had the control of the suit, and might dismiss the same without the sanction of B.  
*Moore & Browder v. Bres*, 532.

SEE EVIDENCE—*Duplantier v. Michoud*, 530.

## PRESCRIPTION.

1. The action of separation of the patrimony of the deceased from that of the heirs, is prescribed in three months from the date of the express or tacit acceptance of the heirs. C. C. Art. 1409.  
*White et al. v. Blanchard et al.* 59.
2. The plea of prescription of five years, on a promissory note, will be maintained when the evidence shows no interruption for that length of time. *Ibid.*
3. The act of the pretended Legislature of Louisiana, approved June 10th, 1863, suspending prescription during the war, and for one year after the ratification of the treaty of peace between the Confederate States and the United States, is not law. The pretended legislators could not make laws; they were never qualified; they did not take the essential oath. *White v. McKee*, 111.
4. The action of the minor against his tutor, respecting the acts of the tutorship, is prescribed by four years, to begin from the day of his majority. C. C. Art. 356. *Viala et al v. Burquieres*, 149.

PRESCRIPTION (*Continued.*)

5. The omission of the tutor to render an account of his tutorship, does not prevent prescription from running, and judgment creditors may avail themselves of it. *Ibid.*
6. Prescription, in regard to claims which the heir may have against the succession, runs against himself, so long as he has not accepted the succession with the benefit of an inventory, and his acceptance as beneficiary heir cannot destroy prescription thus acquired against him during the interval of the opening of the succession. C. C. 3492, 3493. *Ibid.*
7. An endorsement of payment on the back of a note, without evidence showing when and by whom such endorsement was made, will not interrupt prescription. *Graves v. Robertson*, 170.
8. Where a note is prescribed on its face, and it is not proved that plaintiff could not have brought his action at an earlier date, the plea of prescription will prevail. *Ibid.*
9. The mere existence of the late war did not of itself suspend prescription. *Ibid.*
10. The prescription of four years, established by Art. 356 of the Civil Code, does not apply where the minor, after he has obtained his majority, has made a settlement with his tutor, and taken the promissory notes of the tutor in liquidation of his indebtedness. *Perret v. Roussel*, 174.
11. The fact of defendant being in the Confederate service, and thus avoiding citation, does not interrupt prescription. *Hutchinson v. Richardson*, 187.
12. In a suit on an open account, the defence is the prescription of three years, and the evidence shows an acknowledgment and promise to pay several months after the account became due: *Held*—That this promise works an interruption of prescription from the date of the account to the date of the promise, and it only begins to run again from the date of the promise. *Brown & Co. v. McFarland*, 255.
13. By refusing an order of seizure and sale, because the mortgage note was prescribed, the Judge would supply the plea of prescription. *Perroux v. Lacoste*, 266.
14. Prescription is a means of extinguishing a debt, but can only be applied when specially pleaded. *Ibid.*
15. The questions of prescription, and of interruption of prescription, cannot be considered on an application for an order of seizure and sale. The debtor is amply protected by Art. 739, C. P. *Ibid.*
16. The prescription of one year, under Article 3501 of the C. C., does not apply in an action against a *negotiorum gestor* to enforce a quasi contract, *Devat & Co. v. Marx*, 491.

## PRIVILEGES.

1. The plaintiffs, as lessors, have the first privilege on movables seized and sold on a plantation, except on the crops; on which the laborers and overseer have a preference.

*Duplantier et al. v. Wilkins et al.* 112.

2. The proceeds of the crop being exhausted, the sheriff has no right to pay the overseer out of proceeds of movables, to the prejudice of the lessor.

*Ibid.*

3. Where property of a judgment debtor has been seized by virtue of executions in several cases, and a third party enjoins the proceeds of the sale in the hands of the sheriff on the ground that he has a superior privilege on the property seized: *Held*—That on third opponent showing a superior privilege, the seizing creditors can only claim the residue after paying opponent's claim.

*Gleason & McManus v. The Sheriff et al.* 143.

4. The builder has a privilege on the building which he may have constructed, but if the amount is over five hundred dollars, the agreement must be in writing, and registered, to preserve the privilege. C. C. 2746.

*Lacoste v. West et al.* 446.

5. Where property sold under a mortgage brings more than the amount of the mortgage, the builder having a privilege next in rank to the mortgage, is entitled to the overplus

*Ibid.*

SEE LANDLORD AND TENANT—*Knox v. Booth*, 109.

SEE PRACTICE—*Giffin, Smedes & Co. v. Manning*, 204.

SEE SALE—*Burckett v. Hopson*, 489.

## RAPIDES—RECORD OF THE PARISH OF

SEE PRACTICE—*McFeeley v. Osborn et al.* 471.

## RES JUDICATA.

1. The order rendered on executory process is not such a judgment as will have the effect of the thing adjudged. *Res judicata* is not thereby established.

*Humphreys et al. v. Browne et al.* 158.

## SALE.

1. The seller is bound to explain himself clearly, as to the extent of his obligations.

*Hall, Kemp & Co. v. Plassan*, 11.

2. The exhibition of a sample implies a warranty that the thing sold by it shall be, in some measure, in conformity to it.

*Ibid.*

3. The sample is a tacit representation of the quality of the merchandise sold, and except where the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample.

*Ibid.*

4. Where merchandise is sold by a sample, the extent of the warranty is limited to the condition of the article sold at the time of the sale.

*Ibid.*

SALE (*Continued.*)

5. Where the commodity is by its nature, subject to change or deterioration, and no fraud or concealment is shown, the buyer must show that the defect or deterioration existed at the date of the sale, or show that it was discovered as early as it was practicable to make an examination. *Ibid.*
6. A party having purchased a lot of ground at tax sale, and afterwards ejected on account of irregularity in the proceedings, is entitled to recover the value of the improvements made by him.  
*Gernon v. Handlin*, 25.
7. Whenever the thing sold remains in possession of the vendor, the law presumes that the sale is simulated, and as against third persons this presumption must be rebutted by proof.  
*Keller v. Blumhard, Sheriff et al.* 53.
8. The payment of a price less than that stipulated in the act of sale, does not make a simulated sale. *Ibid.*
9. Defendant cannot seize real property, sold by his debtor, after the authentic act of sale is recorded, and, when enjoined by the purchaser from selling the property, set up the defence that the sale was fraudulent; in such a case his defence is confined to the question of simulation. He must resort to the direct action of nullity, to set aside the sale on account of fraud. *Ibid.*
10. In a contract of sale of a lot of cotton a clause was inserted that all parties waive and renounce the benefit of any law requiring actual delivery by weighing, as a condition to complete the sale: *Held*—That the sale is complete from the date of the signing the act, and the cotton is at the risk of the purchaser from that date without actual delivery.  
*Clark & Thieneman v. Norwood et al.* 116.
11. When goods, produce or other objects are sold in the lump, they are at the risk of the purchaser from the date of the sale, but when sold by weight or measure, they are at the risk of the seller until they are weighed or measured. C. C. 2233. *Rhea v. Otto*, 123.
12. Where the vendor, in the sale of real estate, sells all the land lying between designated boundaries, there can be no increase or diminution of price on account of a disagreement of measure. C. C. 2471.  
*Ragan v. Gwinn*, 133.
13. Where the building committee of a corporation sell the corporate property to the builder, in liquidation of his claim, without special authority so to do, the sale will be declared null. The undertaker will, however, be allowed what remained unpaid on his building contract, and for improvements by him made; and will be charged the rents by him received.  
*Church v. Durn et al.* 302.
14. Where articles of merchandise have been sold for cash and delivered, but not paid for, and a third party has attached them in the hands of the purchaser, the vendor may have the attachment set aside, and recover back the goods, if he make demand and identify the object sold within eight days from the day of delivery. C. C. 3196.  
*Burckett v. Hopson*, 489.



SALE (*Continued.*)

15. The sale of a horse, by a person employed by the owner as groom for his stable, is an absolute nullity, and the owner can recover back his property or the value thereof, with damages from the purchaser. *Russell v. Kunemann*, 517.

SEE PRACTICE—*Hart v. Alder*, 301.

## SEQUESTRATION.

1. To entitle a party to the rigorous remedy of sequestration, the affidavit must state either that he has a privilege on the property, or that he is the owner of it. C. P. Art. 275.

*Baer v. Kopfler*, 194.

## SEIZURE AND SALE.

1. To make a valid seizure of tangible property, the sheriff must take actual possession of it. *Mlle et al. v. Hebert et al.* 58.
2. Delivery to the sheriff of property, under seizure, is necessary to enable him to make a valid sale. *Ibid.*
3. When property is seized by the sheriff, and advertised to be sold on a certain day, and the sale is stayed, it gives no right to a second seizing creditor to sell that property, disregarding the first seizure. A good title can only be conferred under the first seizure, which must be first released to enable a second seizure to become valid. *Denton v. Woods*, 356.
4. The seizing creditor can only acquire at a judicial sale the right title and interest of the debtor in execution—nothing more. *Ibid.*
5. Where a *feri facias*, under which property has been seized, is returned not satisfied before the property is sold, the proceeding under the writ will be considered to have been abandoned, and the seizing creditor cannot claim the benefit of any privilege which the seizure gave him on the fruits of the property seized. To enable the plaintiff to sell the property, an *alias fieri facias* must be issued, and a new seizure be made and new notice be given. *Roman v. Denny et al.* 521.
6. The fruits or revenues of real estate which accrue and are separated and gathered from the land prior to the date of the seizure, cannot be sold by the sheriff in satisfaction of the writ in his hands; only such fruits as are produced or gathered since the seizure was made inure to the benefit of the seizing creditor. C. C. 457. *Ibid.*
7. Property sold under a writ of *feri facias*, or by virtue of an order of seizure and sale, must bring two-thirds of its appraisement in cash, otherwise it cannot be sold. *Vincent v. D'Aubigne*, 528.

## SERVITUDES.

1. Where property leased is encumbered with a servitude, or privilege of a date anterior to the lease, the lessee takes the property subject to the encumbrances; and he cannot maintain an action to prohibit the use of the former privileges granted on the property.

*Taylor v. Mohan*, 324.

## SERVITUDES (Continued.)

2. Where a person permits the legal title to property to stand on the public records in the name of another, the property is liable for judgments and liens recorded against the apparent owner, and a sale made under such judgments, mortgages or liens, will confer an indefeasible title upon a purchaser, but a sale made under a *feri facias*, upon a judgment rendered subsequent to the *les pendans* created by a *bona fide* suit between the legal and equitable owners, to adjust their rights to the identical property confers no title greater than the debtor in execution had, notwithstanding the proceeds of the adjudication are used to extinguish the liens. As liens, they remained such, and payment or subrogation conferred no title to the land. *Denton v. Woods*, 356.
3. A suit to relieve property held in common from a public servitude inures to the benefit of the co-proprietor, and a judgment obtained cannot form the basis of title against one's co-owner, or authorize a party to prescribe. *Ibid.*

## SHERIFFS.

1. Where the sheriff and his sureties have been made liable for acts of misfeasance in office, committed by the deputy, they have the right to proceed against that party and his sureties to recover the amount they have been condemned to pay the creditor on account of the misconduct of the deputy. *Simpson v. Lewis et al.* 453.
2. It takes the same length of time to prescribe an action against the deputy-sheriff by the sheriff and his sureties, for misfeasance in office, that it does for the sheriff to prescribe against the creditor, viz : two years. *Ibid.*
3. In a suit against the sheriff and his sureties, the deputy was called in warranty by the sheriff ; judgment was rendered against the sheriff and his sureties, and against the deputy in warranty, the defendants appealed, but the deputy allowed the judgment in warranty to stand, without joining in the appeal : *Held*—That, the judgment of the lower Court against the deputy as warrantor was *coram non judice* in the appellate Court, and must be considered as *res judicata* against the deputy : who having specially plead it in his answer in the suit against him by the sheriff as *res judicata*, he asserted its validity, and cannot aver its nullity when invoked against him. *Ibid.*
4. The sureties of the deputy are in the same attitude with their principal : Their obligation arises *ex contractu* and not *ex delicto*. *Ibid.*
5. Where the sheriff omits to return the *feri facias*, within the time fixed by law, without showing the consent of the party in whose favor it issued, he becomes, personally, liable for the debt, which may be recovered on rule after ten days' notice.

*Taylor, Knapp & Co. v. Hancock & Co.* 466.

SHERIFFS (*Continued.*)

6. The fact that the defendant in execution is insolvent, does not excuse the sheriff from calling on the plaintiff to point out property. He might be insolvent, and still have property liable to seizure.  
*Ibid.*
7. Where the liability of the sheriff is *prima facie* shown by the return, it is incumbent on him to show a legal excuse for his neglect.  
*Ibid.*

## SLANDER.

SEE DAMAGES—*Mallerich v. Mertz*, 194.

SEE DAMAGES—*Bonnin v. Elliott*, 322.

## SOVEREIGN POWER.

1. The prohibition against the enactment of *ex post facto* laws, or laws impairing the obligations of contracts, has no application to the sovereign power.  
*Wainwright v. Bridges et al.* 234.
2. The sovereign power, the paramount law, puts an end to the ownership of slaves; but its effect is not limited to that result. It necessarily pervades the entire contract relating to such ownership, and annuls it throughout.  
*Ibid.*
3. The maxim, *res perit domino*, does not apply where the thing, which is the object of the contract, is not destroyed, but its character only changed by paramount authority.  
*Ibid.*
4. This is not a case in which the thing has perished; but the right of property in all slaves is forbidden by the supreme law and public policy, and no obligation exists. That which is forbidden, is impossible and void. The fact that the contract was made prior to the prohibition, and was then legal, does not relieve it from the effect of the prohibition; and if it be forbidden by public policy and the sovereign will to make a contract, it is equally forbidden to enforce such a contract whenever made.  
(HOWELL, J. concurring.) *Ibid.*
5. The title to the slaves transferred by the plaintiff to the defendant was an incontrovertible one, sanctioned by the laws of the United States and of the State of Louisiana. There was no *pre-existing* right in the sovereign to annul the title for any *anterior vice* in it. Whatever right the sovereign had *in advance* to annihilate all title to slaves, proceeded from his will or caprice.  
(ILSLEY, J. dissenting.) *Ibid.*
6. The maxim of the Roman law, "*res perit domino*," applies not only to cases where there is an *actual perishing* of the physical thing or entity, but to those cases also where the *inalterably permanent* change in the *status* of the object of a sale, destroys and annihilates it as *property*.  
*Ibid.*

SOVEREIGN POWER (*Continued.*)

7. The abolition of slavery is an *inalterably permanent* withdrawal of that species of property from commerce. Therefore, by the abolition of slavery, slaves have perished *as property*, as completely and to all intents and purposes, as if they had been overcome by death. *Ibid.*
8. The act of the sovereign inhibiting slavery was, therefore, a fortuitous event or *vis major*, for which the vendor is not responsible, and the fact that the property sold was an "African slave" does not make the case an exceptional one, so as to exclude it from the rules of warranty applicable to sales of property generally. *Ibid.*
9. It is an attribute of sovereignty to authorize the issue of money, and to legalize its circulation as a medium of exchange.  
*McCracken v. Poole*, 359.
10. By Article 1, § 10, of the Constitution of the United States, no State is permitted to coin money or emit bills of credit. *Ibid.*
11. What one State is prohibited from doing, by the express language of the Constitution, cannot be legally performed by any combination of States. *Ibid.*
12. The late so-called Confederate States never reached the dignity of a *de facto* government, and, consequently, were without the legal right to coin money or emit bills of credit, or authorize their circulation as a medium of exchange. *Ibid.*
13. The act of the sovereign power of the nation abolishing slavery annulled all contracts made in relation to the traffic in slaves, and the Courts are without power to enforce them.  
*Gremillon v. Crousillac et al.* 377.
14. The doctrine in the case of *Wainwright, Adm'r, v. Bridges*, re-affirmed. *Ibid.*
15. The doctrine in the case of *Wainwright, Adm'r, v. Bridges*, re-affirmed.  
*Posey v. Martingley et al.* 384.
16. Plaintiff deposited moneys in the Bank of Louisiana. The bank and all its assets were afterwards seized, and taken possession of by order of the Commanding General of the United States Army; all the assets were turned over by the directors of the bank, including the deposit, to the quartermaster of the department. Plaintiff, a depositor, brings suit against the bank for the amount of the deposits still to his credit. The bank sets up in defence that these deposits have been seized and taken possession of by order of the Commanding General, and the bank is not again liable for their payment: *Held*—That the bank, having paid out all these deposits under an authority they had no right to question nor power to resist, they are no longer liable to pay them to the depositors; that obedience to the military order was full protection to the bank.  
*Mandeville & Montgomery v. Bank of Louisiana*, 392.

SOVEREIGN POWER (*Continued.*)

17. The power of Congress to regulate commerce with foreign nations, and the States of the Union is complete in itself, and has no limitations, other than are presented by the Constitution.  
*See v. Kennedy & Co. 397.*
18. Under the 2d clause of the 10th section of the 1st Article of the Federal Constitution, the States are without power to impose any duty or tax upon any property imported into their territorial limits, while the imported articles remain the property of the person sending them there for sale, or while it remains in its original form or packages.  
*Ibid.*

## STAMPS, REVENUE

1. The absence of the requisite United States internal revenue stamps on letters of administration, and the papers in the proceeding for the appointment of the administrator, is fatal to his appointment.  
*Blake v. Hall, 49.*
2. The Supreme Court will not presume that the District Court received documents in evidence without the proper United States revenue stamps.  
*Towne v. Bossier, 162.*
3. An entry made by the clerk of the District Court in the margin of the record of appeal, opposite the copy of note sued on, stated that: "No stamps as required by law, annexed or attached to this note," is not evidence that the note was received by the lower Court without the proper revenue stamps.  
*Stark v. Bossier, 179.*
4. Obligations, executed prior to the first of October, 1862, need no internal revenue stamp to give them validity.  
*Bayly v. McKnight, 321.*

## STEAMBOATS.

1. Where a steamboat or other vessel arrives at a port with freight consigned to different parties residing there, a delivery of the goods on the wharf to the agent of the consignee, or some person authorized to receive them must be made, or some act must be done which is equivalent to delivery, in order to relieve the owners of vessels from responsibility. To constitute a delivery, there must be a notice given to the consignee, and a reasonable time given him to make the necessary preparations to receive the goods.  
*Kennedy & Co. v. Roman et al. 519.*

SEE CONTRACTS—*Benton v. Hope & Tally, 463.*

SEE DAMAGES—*Kellogg v. Steamboat T. D. Hine, 304.*

## SUBROGATION.

1. Defendant executed two promissory notes for \$4,000 each, dated February, 1860, secured by special mortgage on real estate in Shreveport; W. A. Violett & Co. of New Orleans, afterwards became the holders of these notes. In the month of December, 1865,



SUBROGATION (*Continued.*)

defendant drew two drafts, for the amount of the two notes and interest in favor of W. A. Violett & Co., on Messrs. Levy & Dieter, with stipulation in the drafts, that on payment they would become subrogated to all the rights and privileges of W. A. Violett & Co. to the two mortgage notes held by them. The drafts were accepted and paid at the time fixed, 18th of March, 1866, and the mortgage notes delivered to them: *Held*—That by the holders of the notes, W. A. Violett & Co., endorsing on the back "received payment as stated," they adopted all the conditions in the drafts, as much as if they had repeated the expression of subrogation in the receipt, and that a complete subrogation took place at the time of payment.

*Levy & Dieter v. Laer*, 468.

## SUCCESSIONS.

1. The action of separation of the patrimony of the deceased from that of the heirs, is prescribed in three months from the date of the express or tacit acceptance of the heirs. C. C., Art. 1409.

*White et al. v. Blanchard et al.* 59.

2. Article 1005 of the Civil Code is in harmony with the articles thereof specially applicable to the payment of the debts of the succession. The remedy awarded by the former Article lasts as long as does the action for the separation of patrimony, and no longer. *Ibid.*

3. Plaintiffs being mere ordinary creditors of the succession, their action is a personal one against each one of the heirs, to recover from him his virile share of his ancestor's debt, and plaintiffs have no legal right to stay, by injunction, the defendant's order of seizure and sale. Even privilege or mortgage creditors cannot arrest execution, but must resort to the remedy by third opposition, to stay the proceeds of sale in the sheriff's hands until the conflicting rights of preference to the fund can be determined. *Ibid.*

4. By the death of a creditor, his universal legatee, who is one of the forced heirs, becomes a creditor in his stead.

*Succession of Vick*, 75.

5. The husband's separate property, being adjudicated to the widow as a part of the community, the subsequent creditors of the widow cannot treat the adjudication as an absolute nullity.

*Fendler v. Daigre*, 190.

6. Heirs entitled only to the residuum of a succession, should not interfere to take property out of the hands of the administrator until the debts and charges of the succession are paid, and the final account of the administrator homologated.

*Smith v. Westholtz*, 293.

7. Subjects of Bavaria are exempt by the consular convention, entered into between the United States and that kingdom on the 21st of January, 1845, from the tax of ten per cent. on successions in this State, going in whole or in part to persons not being domiciliated in this State, and not being citizens of any other State or territory of this Union.

*Succession of Crusius*, 369.

SUCCESSIONS (*Continued.*)

8. The heirs of the deceased become seized of the property of their ancestor at the moment of his decease. The surviving widow is seized of one-half of the community property, and the heirs of the other. *Ware et al. v. Jones*, 428.
9. The title so vested continues in them, subject to be divested at any time by the creditors themselves, or by the administrator for them. The widow and heirs take the estate absolutely, subject to the debts and charges against it; and all that is meant by residuary rights is, that the property is thus incumbered. *Ibid.*
10. Where the widow and heirs of a deceased party bring suit against a third party in possession for property belonging to them, the third possessor cannot require them to show affirmatively that the administration is closed before they can recover. *Ibid.*
11. A third possessor cannot set up that there are creditors holding claims against the property in his possession to defeat the heirs; only the creditors, themselves, or the administrator for them, can make such defence. *Ibid.*
12. Where a succession of the wife has been regularly opened and administered, and a tableau of distribution among the creditors and heirs has been filed and homologated, the heirs can only claim the residue after deducting the amount of the succession liabilities and expenses incurred in the administration. *Succession of Bachemin*, 488.
13. If the heirs have a judgment for their paraphernal rights against the estate of their deceased mother, such judgment is subject to a reduction to the extent of the legitimate charges against the succession; and the administrator cannot be required to pay more. *Ibid.*

SEE PRACTICE—*Guion v. Guion*, 81.

## TAXES—TAX SALES.

1. Where the city assessor for the city of New Orleans has placed an over valuation on property, thereby causing an increase on the taxes thereon, and the board of assessors fail or refuse to make the reduction in the valuation, the party aggrieved may recover, by suit in the civil courts, from the city, the amount that he has been compelled to pay, on account of the over valuation of the assessment. *James v. New Orleans*, 109.
2. Claimants of land under tax sales are held rigidly to show that all the requirements of law have been fully complied with. It is incumbent on them to produce the assessment, and show its legality. *Brady v. Offutt et al.* 184.
3. A person may be compelled to pay a license tax in any parish where he is carrying on a profession or calling, whether it be his domicile or not, unless he can show payment in the parish of his domicile. *Capella v. Carridine*, 305.

TAXES—TAX SALES (*Continued.*)

4. A person cannot be subjected to pay a license tax under the law of March 15th, 1865, on account of acts done before the passage of the law. *Ibid.*
5. The State of Louisiana cannot tax property brought here from other States of the Union, for sale or reshipment, until it has been mixed with and forms a part of the common mass of the property of the State. *State v. Kennedy & Co.*, 397.
6. An agent or commission merchant domiciliated in this State, receiving property on consignment from another State for sale on commission, cannot be taxed on the amount of the gross sales made of the goods in their original form or packages, where he accounts to the owner (a non-resident) for the price obtained, less his commissions for making the sale. *Ibid.*

SEE CURATOR AD HOC—*Gernon v. Handlin*, 25.

## TUTORS AND TUTORSHIP.

1. The under-tutor is not personally liable for expenses of litigation in a suit brought by him for the removal of the tutor, and in proceedings on opposition to the tutor's account of administration, unless he acted in bad faith. Failure does not of itself prove bad faith. The fees of counsel in such cases do not depend on success, and are to be paid by the estate of the minor. *Lacey v. Lanoux*, 153.
2. The prescription of four years, established by Art. 356 of the Civil Code, does not apply where the minor, after he has obtained his majority, has made a settlement with his tutor, and taken the promissory notes of the tutor in liquidation of his indebtedness. *Perret v. Roussel*, 174.
3. The legal mortgage in favor of minors upon the property of their tutors, created by Article 3282 of the Civil Code, is assignable, but it cannot be extended so as to cover the expansion of the debt by the addition of the interest stipulated in consideration of an extension of time. *Ibid.*
4. Where the executor of a deceased tutor, under the order of the Court, files an account of the tutorship, he must show that the estate of the minor has been managed with a scrupulous regard for his interests. The casualty, by which the litigants have been deprived of written evidence, does not dispense them from the necessity of supplying it, as far as possible, by secondary evidence. *Succession of Peniston*, 277.
5. It is the settled jurisprudence of this State, that a tutor of minor children is competent in that capacity to administer the succession of the deceased, so long as not opposed by the creditors. *Vincent v. D'Aubigné*, 528.

## WARRANTY.

1. The exhibition of a sample implies a warranty that the thing sold by it shall be, in some measure, in conformity to it.  
*Hall, Kemp & Co. v. Plassan, 11.*
2. The sample is a tacit representation of the quality of the merchandise sold, and except where the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample.  
*Ibid.*
3. Where merchandise is sold by a sample, the extent of the warranty is limited to the condition of the article sold at the time of the sale.  
*Ibid.*
4. The warrantor cannot be condemned to pay more than the price recovered by him, no damages being proved.  
*Sullivan v. Goldman, 12.*
5. Plaintiff warranted defendant against eviction of the slaves, by any right existing previous to the sale. The right of the sovereign to evict the subject of his property, is not to be disputed. That right *existed before* the sale of the slaves, and was *since enforced*. Plaintiff is, therefore, concluded by his warranty. Had there been no warranty in the sale, he would have been entitled to recover.  
(HYMAN, C. J., concurring.) *Wainwright v. Bridges et al. 234.*
6. It matters not whether slavery was introduced by express law or otherwise, *if it have the authority of law*, and by our law slaves, *ex nomine*, were classed as things with every other species of corporeal objects. They were *property* in the strictest sense of the term. They were deemed so to be by the Constitution of the United States, up to the time when, by an amendment to that instrument, slavery was abolished. They were introduced into Louisiana *as property*, by the treaty of cession of 1803, and the laws of the United States and of the State of Louisiana *recognized slaves as property*, until the time of the rebellion. Hence, it cannot be controverted, that when the sale by plaintiff to defendant was passed, *it embraced every element of a legal contract*. The question, therefore, is purely one of warranty.  
*Ibid.*
7. Warranty, under our law, in contracts of sale, exists in all cases where the loss of, or eviction from, the thing sold is imputable to the vendor, or *to the imperfection of his title*, and not where the loss or eviction proceeds from some unforeseen, fortuitous event, beyond the control of the vendor.  
*Ibid.*  
(ILSLEY, J., dissenting.)

## WILLS.

1. The testator, Asa H. Mitchell, in his last will bequeathed to his executors certain slaves *in trust*, for the purpose that they should pay over to his mother annually, during her lifetime, the net income and revenues of said slaves, and after her death to convey them, with their natural increase, if any, to her children, *per stirpes*, in full warranty: *Held*—That such a disposition is reprobated by our Code.  
*Whitehead et al. v. Watson et al. 68.*

## WITNESS.

1. Where one party leases a livery stable and premises to two parties in partnership, and one of the lessees purchases the interest of the other, and gives a warranty against all liability, and the lessor recognizes the sale and release of one of the lessees by the other, by receiving the rent and giving him written notice that his lease will terminate at a certain date, the lessee who has been released is a competent witness to testify in a suit for damages between the lessor and lessee. *Crane v. Harris*, 114.
2. In a criminal prosecution, where a witness has been examined by the State, and consigned to the defendant, he can only be re-examined by the State for the purpose of explaining any facts which may come out on the cross-examination, and must be confined exclusively to the cross-examination. *State v. Denis*, 119.
3. The law has fixed no qualification of age, as to the competency to testify in criminal matters. The competency of a witness as to age, depends on his intelligence, judgment, capacity and understanding, all of which must be left to the discretion of the Judge and the jury. *Ibid.*